So the jury acquits O'Keefe of FIRST DEGREE INTENTIONAL MURDER Then, the appellate court acquits O'Keefe of the UNLAWFUL ACT. Here is what we have.

The jury returns a UNINTENTIONAL, UNPREMEDITATED, UNDELIBERATED guilty verdict of Second Degree malice murder IMPLIED by the SAME alleged single act they acquitted me of in first degree murder. However, the appellate court acquits me of the UNLAWFUL ACT. So, conclusively the battery argued as the underlying act is completely lacking.

Collateral Estoppel clearly applies This issue of any battery has been decided and is no longer OPEN to consideration. Remembering the issue was in Favor for the defendant. ONLY the Nevada Supreme Court can change the LAW of the CASE.

: JUDICIAL ADMISSION MADE BY STATE

At the end of the second trial the state makes judicial admission and makes it a matter of the record. (EXHIBIT 8, id at Page 57, lines 7-23)

Clearly the State admits the N.S.C. decided issue #2 on direct appeal. He also repeatedly admits the N.S.C. was aware of what was "second degree murder" and not only was the instruction wrong, but it was precisely why it got REVERSED. The evidence didn't "SUPPORT IT." Mr. LALLI truly is WISE at times. The second jury hung, not being able to convict beyond a reasonable doubt based on INSUFFICIENT EVIDENCE again. However, that is what the N.S.C. already said on DIRECT APPEAL.

??

III.

C. TWO UNTRUTHS - STATE'S WITNESSES; CHERYL MORRIS and DETECTIVE WILDEMANN

UNTRUTH #1: IN the petrocelli hearing conducted on MARCH 16, 2009, the birth of this lie occurred. Mr. Smith, for the State, used his star witnesses for this testimony. This claim has been made to this day which must end. The claim is that Mrs Whitmarsh testified against O'Keefe resulting in O'Keefe getting convicted and going to prison for a three year prison term. The case was the FELONY battery domestic violence case, C207835. How ironic, this was another reason stated in the State's plea to bring in the FELONY battery domestic violence case in their case in chief to help bolster their INTENT and MOTIVE in hopes for a first degree murder verdict. This testimony was given in the State's opening statement, during their C.I.C., and in closing argument for BOTH TRIALS. Here now is the TRUTH.

- (see CASE NO. C207835 WEDNESDAY, SEPTEMBER 21, 2005 RECORDER'S TRANSCRIPT)
(JURY TRIAL DAY TWO - VOLUME TWO EXHIBIT 12)

Mrs Whitmarsh's testimony is COMPLETELY for O'Keefe. Stop the perjury. (id at Pages 18-34) The State is knowingly allowing this. Also, O'Keefe was acquitted which makes it no longer relevant. ALSO, LAW of the Case APPLIES.

UNTRUTH #2: Also, throughout the petrocelli and both trials it repeatedly is misstated that O'Keefe did three years in prison. Another lie. O'Keefe did (13) months at TONOPAH FIRE CAMP. Minimum security, no doors, no locks, worked all over county, outside. Testimony to this is by O'Keefe's current P.S.I., page 6, II received in Fact on this instant case. Stop the UNTRUTHS.
(see P.S.I. CASE C250630 PAGE 6 APRIL 2009 EXHIBIT 13)

READ TOP RIGHT HAND CORNER & RPT.

III.

d. REHASHING EVIDENCE - STATE HELD TWO PETROCELLI HEARINGS ON MISDEMEANORS

FIRST TRIAL

On February 10, 2009 States Motion to Admit Other Crimes is heard.
(see Tuesday, February 10, 2009 ROUGH DRAFT TRANSCRIPT EXHIBIT 14)
The Court inquires about the bad acts. The State submits he is only trying to get the ONE FELONY for his case. (id at Page 8, lines 18-25)
Of course this being the Felony battery constituting domestic violence. CASE C207835. The Court States he wants to hear more on the matter of the crimes and schedules a Petrocelli hearing. (id at Page 9, lines 17-22)
Petrocelli hearing is now completed on March 16, 2009.
(see MONDAY, MARCH 16, 2009 JURY TRIAL DAY 2 TRANSCRIPT EXHIBIT 15)
State starts off with the TWO UNTRUTHS previously brought up in c.
The lies that whitmarsh testified against O'Keefe in Felony case C207835 and that O'Keefe did three years as a result. (id at Pages 2-3)
Mr. Smith declares he only is going to use the felony unless O'Keefe opens the door to the misdemeanors. (id at Page 12, lines 1-7)
The Court explains to O'Keefe that if he takes the stand he should be careful not to blurt anything out and open the door. EMPHASIS on the other misdemeanor domestic violence issues could adversely impact my case. (id at Page 13, lines 1-10)
Now for the record, O'Keefe wishes to manifest the States Motion reflecting knowledge of every act before trial.
(see Notice of Motion and Motion to admit Evidence of other crimes EXHIBIT 16)
(ELECTRONICALLY FILED FEBRUARY 2, 2009 CASE C250630)
The State list every misdemeanor act by their Justice Court numbers. (id at Pages 6-8) Special Note again on PAGE 8, the State specifically requests C207835, only in it's case-in-chief. (LINES 6-8.)

Again also noting the State alleges O'Keefe did (3) years in prison because "SPECIFICALLY" due to Mrs. Whitmarsh's testimony. Also, he requested the Febny d.v., C207835, for Motive and INTENT. (id at Page 8, lines 14-20)

SECOND TRIAL
(No BAD ACTS MISDEMEANORS)
THIRD TRIAL

After second trial hung, based on insufficient evidence to convict, the State has Second Chair File a Motion in Limine to Admit, MISDEMEANORS. (Motion in Limine to Admit Evidence of other BAD ACTS. EXHIBIT 17)

(ELECTRONICALLY FILED JANUARY 6, 2011 CASE C250620 HEARING 1/20/2011)

With "DILIGENCE" the State list exactly, every single misdemeanor case from the hearing prior to trial #1, almost two years prior.

Also noting, the State now list every misdemeanor case by the EVENT NUMBER versus the JUSTICE COURT CASE No. (id at Pages 3-6) How about N.R.S. 50.095 ?

★ NOTE: The Double Jeopardy CLAUSE requires the government to put on its strongest case the FIRST TIME. Also, the State cannot REVISH SAME EVIDENCE FROM FIRST TRIAL. On 3/13/12, the Judge just gave his ruling that only the misdemeanor event # 040602-3158, which was enhanced to the Febny BATTERY D.V. case C207835 "can again" be used. (ORDER FILED MARCH 13, 2012 EXHIBIT 18)

IV. AUTHORITIES - ARGUMENT

IN Closing Argument, of the First trial, PROSECUTOR SMITH ARGUES in fact that a "battery domestic violence precipitated the stabbing." (id at Page 179, lines 1-2, EXHIBIT 5) - "BATTERY OR SOMETHING"

Most important is at the very end of his closing argument, the State again suggest and plants the "seed" again, in the jury's mind, that the BATTERY ACT sustains the INTENT required. (id at Page 178, lines 13-16 EXHIBIT 5)

Specifically, he states, "it doesn't make the UNDERLYING ACT any less criminal." WHAT ACT ? THE SAME SINGLE ALLEGED BATTERY D.V. ACT. !

- IN (STATE v. MANGANA) 33 Nev. 311, 112 P. 693 (NEV 1910) –
  - Allows the State to pursue a first degree murder without charging the other crime. A charging document alleging murder in the ordinary form and proof that it was committed in the perpetration of the underlying act, then MALICE is IMPLIED. Of course, this works for Second Degree, also.

In the INSTANT CASE, without a doubt, the State was prosecuting upon the theory that the HOMICIDE was committed in carrying out the UNDERLYING ACT, (crime) of Battery Constituting Domestic Violence as charged initially when ARRESTED. (11-5-2008) (see EXHIBIT 1 - Charge Battery D.V. COMPLAINT 11/7/2008)

Malice to sustain the general intent required would then be IMPLIED.

- IN (LABASTIDA v. STATE) 112 Nev. 1502, 931 P.2d 1334 (Nev. 1996)
  - Implied malice may be found when : 1) The killing resulted from an INTENTIONAL ACT. 2) The natural consequences of the act are dangerous to human life, AND 3) [T]he act was deliberately performed with knowledge of the danger to, and with conscious disregard for, HUMAN LIFE. (Id. 1347)

This is EXACTLY THEORY #2 of JURY INSTRUCTION #18 in the INSTANT CASE, C230630. (See JURY INSTRUCTIONS EXHIBIT 10)

• IN (LABASTIDA V. NEVADA) 115 Nev 298, 986 P.2d 443 (Nev. 1999)

● INSTRUCTION NO. 27 in Labastida on Second Degree MURDER was IDENTICAL to O'KEEFE'S INSTRUCTION NO. 18. (✠ 448) They define what is NOT involuntary manslaughter BUT BECOMES SECOND DEGREE MURDER WHEN,

"the involuntary killing occurs in the commission of an UNLAWFUL ACT, which in its consequences, naturally tend to destroy the life of a HUMAN BEING"...

This is ABSOLUTELY the SECOND THEORY on my INSTRUCTION # 18. We must remember that defining and proving malice is established.

• IN (KEYS V. NEVADA) 104 NEV. 736, 766 P.2d 270, (Nev. 1988)

● HN[4] Proving express malice means proving a deliberate intention to kill; WHILE PROVING IMPLIED MALICE MEANS PROVING ONLY THE COMMISSION OF THE UNLAWFUL ACT.

✠ Now the problem O'Keefe has is on my direct appeal, the LAW of the Case has been PRONOUNCED. ADJUDICATED, ALLEADY!

The Law of the Case on the First appeal is the LAW of the Case on all subsequent appeals where the Facts remain the same.

✠ HABERSTROH V. NEVADA, 119 Nev 173, 69 P.3d 676 (Nev. 2003) HN[2]

The DOCTRINE OF THE LAW of the CASE specifically states,

(1) the judgment of that court is final upon all questions decided and those questions are, ARE NO LONGER OPEN TO CONSIDERATION. Issue #2 was decided in Favor of the defendant on direct appeal. The evidence at trial did not prove O'Keefe committed an unlawful act. To CONVERSELY, if the state's charging document would have alleged a

battery, it would not have mattered. Remembering State ARGUED the ACT. For Collateral ESTOPPEL PURPOSES the following would then apply.

● IN (U.S. Court of APPEALS 9th v. Castillo-BASA) 483 F.3d 890 (9th 2007)

● HN [1]

The Double Jeopardy Clause forbids the government from conducting a series of prosecutions, involving the SAME FUNDAMENTAL ISSUE in which it presents additional arguments and evidence at each iteration." HN [1]

An issue that is an element of the Offense is always material to a subsequent claim of Collateral Estoppel. HN [5][6][7][8]

The Double Jeopardy Clause does not only bar a second prosecution on the same charge of which a defendant has been previously acquitted (or convicted). It also prevents the government from seeking to prosecute a defendant on an ISSUE that has been determined in the defendant's favor in a prior prosecution, regardless of the particular offense involved in the earlier trial (Ashe v. Swenson, 347 U.S. 443)

Put another way, "[W]hen an issue of Fact or Law is actually litigated and determined by a final and valid judgment, and the determination is ESSENTIAL to the judgment, the determination is CONCLUSIVE in a subsequent action between the parties, whether on the same or a different claim."

● As the SUPREME COURT has explained, Collateral Estoppel in the criminal context - the protection against the relitigation of issues previously determined - is "an integral part of the protection against double jeopardy guaranteed by the Fifth and enforceable by the Fourteenth."

Also, the FIFTH AMENDMENT, as interpreted in (Ashe v. Swenson) BARS relitigation of an issue already decided, NO MATTER HOW MUCH ADDITIONAL EVIDENCE the government may wish to introduce at a THIRD TRIAL, like the instant case.

NEW EVIDENTIARY FACTS may not be brought forward to obtain a different determination of the ULTIMATE FACT. see • HERNANDEZ, (572 F.2d at 221 n. 3)

Also, rehashing of old evidence previously presented would clearly be PROHIBITED by the Collateral Estopped Doctrine. • Sierra, (596 F.2d at 407)

The State, in the INSTANT CASE, has now violated Double Jeopardy's offspring, collateral estoppel under the 5th AMENDMENT of the Laws and treaties of the U.S. Constitution, also my due process rights enforceable by the 14th AMENDMENT that is guaranteed and applied to the State's. [Under (Benton v. Maryland) CITE: 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)] The mention of any Battery is barred, in any Fashion what-so-ever. The INTENT was ADJUDICATED as lacking, not proven. The act has been declared not PROVEN beyond a reasonable doubt.

Also, now "barred", which also was violated, was/is the prosecutions theory of the unlawful, intentional stabbing with a knife.

• IN (SANTAMARIA v. HOLSLEY) 133 F.3d 1242 (9th 1998)

The petitioner moved to prevent the State from proceeding on the theory that he personally used a knife and stabbed victim. The trial court granted the Motion based on Collateral Estoppel.

• IN (Petheway v. Plummer) 943 F.2d 1041 (9th cir 1991)

• The prosecution concedes that at all times [its] theory of prosecution at the first trial and even now at retrial would be Petheway shot and killed the victim. Without it, there is no other theory of prosecution to succeed in any conviction. Point being that in Santamaria's case, the prosecution also admitted that they had no other evidence that the defendant was anything but the stabber...

• Santamaria, 8 Cal.4th at 929, 35 Cal.Rptr.2d 624, 884 P.2d 81.

The fact remains the same here for O'Keefe in the INSTANT CASE. When the act was not proven the State lost intent. (PERIOD) For SECOND DEGREE MALICE MURDER, the state has no other theory available to SUSTAIN the general intent required. Moreso, in the instant case, O'Keefe has already been acquitted of the INTENT, by the jury, and the underlying act also by the Nevada Supreme Court.

• IN (SCHIRO v. FARLEY) 510 U.S. 222, 114 S.Ct. 783 (1994)

• HN [10][11]

Issue prechsion attaches only to determinations that were necessary to support the judgment entered in the first action. Schiro didn't convince the Court on the intentional murder argument. In the instant case however, O'Keefe has been acquitted of INTENTIONAL murder, by the JURY, and any underlying act by the N.S.C. (The alleged intentional battery)

V. CONCLUSION

UNITED STATES DISTRICT COURT JUDGE GLORIA NAVARRO already has made a predetermination that as, N.A.S.A. would say, "Houston, we have a PROBLEM!" (Judge Navarro only wants the issue exhausted.)

I read in SANTAMARIA, * 1250, it made no difference that Santamaria's claim of exclusion is based on collateral estoppel rather than the more familiar constitutional grounds. IN Fact, they said Pettaway erred in asserting federal jurisdiction BEFORE retrial. My second trial ended.

☞: My point is, with both trials now completed, it makes it much easier to make MANIFEST my claims on the repeated usage of the evidence, theory of criminal culpability and the adjudicated issue on INTENT. Also the same sovereign, and same statutory charge.

• [ONLY until trial, could we see STATE'S evidence used.] I'm officially declaring that CONSTITUTIONAL COLLATERAL ESTOPPEL applies on several operatives. My 5th and 14th AMENDMENT RIGHTS have been violated and will so further, if the third trial could somehow proceed. Any future theory of intentional stabbing must be barred. Based on no theory of prosecution and violations, I request dismissal with prejudice, of the Second AMENDED INFORMATION charging second-degree murder w.o.w. (Also based on insufficient evidence)

• CONSIDER THIS! - With all the evidence wrongfully used, the State could not prove the charge. Without that evidence, how will State prove something that defendant already, anyway, has been acquitted of? The judgment of acquittal simply was never entered on second degree. (FORMER JEOPARDY ISSUE PENDING IN 9th - WILL COA BE ISSUED)

• CASE NO. C251630

DECLARATION

Defendant has constructed and verified contents of his MOTION to Dismiss A copy of said motion was hand delivered and signed for by the parties listed below.

Dated: March 14, 2012

Brian O'Keefe
BRIAN O'KEEFE - #1147732

Copies; 1) Clerk of the Court
2) District Attorney
3) Judge M. Villani

(• MOTION TOTAL 24 pgs.
• APPENDIX-EXHIBITS 178 pgs
EXHIBITS #'s 1-18
18 TOTAL EXHIBITS)

DATED THIS 14th day of MARCH, 2012.

I, BRIAN KELLY O'KEEFE #1147732, do solemnly swear, under the penalty of perjury, that the above MOTION to DISMISS based on 5th Violation is accurate, correct, and true to the best of my knowledge.

NRS 171.102 and NRS 208.165.

Respectfully submitted,

Brian K. O'Keefe

BRIAN K. O'KEEFE

Defendant - PRO SE
#1147732

R.O.C.

BRIAN O'KEEFE
C.C.D.C.
330 S. Casino Ctr. Blvd.
Las Vegas NV 89101

IN THE
EIGHTH JUDICIAL
DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff,

VS.

BRIAN KELLY O'KEEFE,
Defendant.

CASE NO: C250630

DEPT NO: XVII

- MOTION TO DISMISS – 24 Pages
- APPENDIX OF EXHIBITS – 178 Pages

RECEIPT OF COPY

Receipt of copy of Defendant's MOTION TO DISMISS BASED UPON VIOLATION(S) OF THE FIFTH AMENDMENT COMPONENT OF DOUBLE JEOPARDY CLAUSE, CONSTITUTIONAL COLLATERAL ESTOPPEL AND, ALTERNATIVELY, . . . THE ALLEGED BATTERY ACT DESCRIBED IN THE AMENDED INFORMATION, is hereby acknowledged. (APPENDIX OF EXHIBITS ALSO TOTAL 178 PAGES EXHIBITS (1-18))

HONORABLE M. Villani — CLERK of the COURT — DISTRICT ATTORNEY

X D.I. CAMPBELL PUT IN BOX X Filed/Steve X Eileen Morelle

Regional Justice Center
200 LEWIS AVE.
LAS VEGAS, NEVADA 89155
MARCH 16, 2012

Regional Justice Center
200 LEWIS AVE.
LAS VEGAS, NEVADA 89155
MARCH 16, 2012

- R.O.C. -

Regional Justice Center
200 LEWIS AVE.
LAS VEGAS NEVADA 89155
MARCH 16, 2012
HAND DELIVERED
SECOND COPY 3-22-12
P.I. STEVE CAMPBELL

Pro Se

BRIAN KELLY O'KEEFE
#1147752
CLARK COUNTY DETENTION CENTER
330 S. CASINO CENTER BOULEVARD
LAS VEGAS NEVADA 89101

FILED

MAR 16 12 06 PM '12

CLERK OF THE COURT

IN THE
EIGHTH JUDICIAL
DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
plaintiff,

vs.

BRIAN KELLY O'KEEFE,
defendant.

CASE NO: C250630

DEPT NO: XVII

EXHIBITS: 1 - 18
(61)

APPENDIX OF EXHIBITS

For;

MOTION TO DISMISS BASED UPON VIOLATION(S) OF THE FIFTH AMENDMENT COMPONENT OF THE DOUBLE JEOPARDY CLAUSE, CONSTITUTIONAL COLLATERAL ESTOPPEL AND, ALTERNATIVELY, CLAIMING AFFIRMATIVE, UNFORGIVABLE BY THE FOURTEENTH AMENDMENT UPON THE GROUNDS PRECLUDING SOLELY THEORY OF PROSECUTION BY UNLAWFUL INTENTIONAL STABBING WITH KNIFE, THE ALLEGED BATTERY NOT DESCRIBED IN THE AMENDED INFORMATION.

DATED: March 14, 2012

BRIAN K. O'KEEFE
#1147752
DEFENDANT IN PRO SE

BRIAN HENRY O'NEILL
C.C.D.C.
330 S. CASINO CTR. BLVD.
LAS VEGAS NV 89101

STATE OF NEVADA,
Plaintiff,
vs.
BRIAN HENRY O'NEILL,
Defendant.

CASE NO. C250630

APPENDIX OF EXHIBITS

IN THE
EIGHTH JUDICIAL
DISTRICT COURT
CLARK COUNTY, NEVADA HONORABLE Villani
DEPT NO. XVII

(5TH AMENDMENT VIOLATIONS COLLATERAL ESTOPPEL) CASE NO. C250630

PRO SE, MOTION TO DISMISS, APPENDIX OF EXHIBITS

EXHIBIT NO.	DOCUMENT TITLE	TOTAL OF PAGES
1	BATTERY D.V./MURDER COMPLAINT	2
2	INFORMATION - C250630 12/19/2008	3
3	AMENDED INFORMATION 2/10/2009	3
4	MONDAY, MARCH 16, 2009 ROUGH DRAFT TRANSCRIPT	2
5	FRIDAY, MARCH 20, 2009 ROUGH DRAFT TRANSCRIPT	15
6	SECOND AMENDED INFORMATION - C250630	3
7	WEDNESDAY, AUGUST 25, 2010 ROUGH DRAFT TRANS.	12
8	TUESDAY, AUGUST 31, 2010 ROUGH DRAFT TRANSCRIPT	29
9	TUESDAY, APRIL 7, 2009 ROUGH DRAFT TRANSCRIPT	4
10	JURY INSTRUCTIONS NOS. 1, 3, 18 MARCH 26, 2009	3
11	ORDER OF REVERSAL AND REMAND NO. 54159	2
12	WEDNESDAY, SEPTEMBER 21, 2005 - C207935	7
13	PRESENTENCE INVESTIGATION REPORT - C250630	1
14	TUESDAY, FEBRUARY 3, 2009 ROUGH DRAFT TRANS.	5
15	MONDAY, MARCH 16, 2009 DAY 1 TRANSCRIPT	26
16	MOTION IN LIMINE TO EXCLUDE EVIDENCE (2/2/09)	16
17	MOTION IN LIMINE TO ADMIT EVIDENCE OF OTHER BAD ACTS (1/6/2011)	26
		161 TOTAL PAGES

(DATED MARCH 11, 2011)

[FILED MARCH 13, 2012]

18 ORDER GRANTING, IN PART, THE STATE'S MOTION TO ADMIT EVIDENCE OF OTHER BAD ACTS

• SUPP

SUPPLEMENT TO PET
( ) SUPP

Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

DA
PP

IN THE DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * * • SUA SPONTE DETERMINE, IF NEEDED, EVIDENTIARY HEARING, REQUESTED

Brian Kerry O'Keefe,

Petitioner,

-vs-

State of Nevada et al.,

Respondent.

Case No. C0C250630

Dept. No. XVII

See TABLE of AUTHORITIES Attached.

Date of Hearing: 07/10/15
Time of Hearing: 08:15 AM

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

(Post-Conviction Relief - NRS 34.735 Petition, Form)

NOTE: This supplement only adds to the original petition filed. This does not waive the jurisdictional claim already existing, but adds grounds 1-12 with appendix of exhibits attached.

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

ICC LI FORM 24.080

• FEDERAL

TABLE OF AUTHORITIES

• STATE

TABLE OF AUTHORITIES

CASE — PAGE No.

TABLE OF AUTHORITIES

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Lovelock Correctional Center, Pershing County, Nevada.

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court In and for the County of Clark

3. Date of judgment of conviction: August 26 2002

4. Case number: ~~C225626~~

5. (a) Length of sentence: ten (10) to twenty-five (25) years Consecutive eight (8) to twenty (20) years

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ___ No ✓

If "yes," list crime, case number and sentence being served at this time: ___

7. Nature of offense involved in conviction being challenged: Sexual Assault Robbery Malice (implied) Murder W.D.W.

8. What was your plea? (check one)

(a) Not guilty ✓
(b) Guilty ___
(c) Guilty but mentally ill ___
(d) Nolo contendere ___

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury ✓ (b) Judge without a jury ___

11. Did you testify at the trial? Yes ___ No ✓ FIRST TRIAL ONLY

12. Did you appeal from the judgment of conviction?

Yes ✓ No ___ FIRST #35537 and THIRD #61631 DIRECT APPEALS (2ND TRIAL MANDAMUS #58109)

13. If you did appeal, answer the following:
(a) Name of court: SUPREME COURT OF NEVADA
(b) Case number or citation: 23537, 58109, 61631
(c) Result: REVERSED - REMAND FOR PROCEEDINGS CONSISTENT WITH CROSS-APPEALS
(d) Date of result: April 2, 2008 - April 10, 2013
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ✓ No ___

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: U.S.D.C. CASE NO. 2:11-cv-02107-GMN-
U.S.D.C. CASE NO. 2:12-cv-01356-MMD-GWF

(2) Nature of proceeding: Double Jeopardy Pre-Trial
28 U.S.C. § 2241(c)(3) Habeas Appeal 5th Violation by second trial on same offense after acquittal.

(3) Grounds raised: Double Jeopardy Violation by second-
trial jury panel sworn in with third trial pending with state proceedings
with third trial in want of jurisdiction while appeal was pending.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ___ No ✓

(5) Result: SHOW CAUSE ORDERED TO DEFENDANT

(6) Date of result: Feb. 3, 2012

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Matter appealed being ultimately appealed to U.S. Supreme Court MAY 28, 2015 - Certiorari

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ___ No ___

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?
Yes ___ No ___

Citation or date of decision: SEE INITIAL PETITION FILED AMENDED Sep. 15, 2014

(2) Second petition, application or motion?
Yes ___ No ___

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes ___ No ___

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)
APPEALED DENIAL OF P.F.R. 9th CIRCUIT CASE No 12-15071 on Feb. 2, 2015. PETITION FOR REVIEW TO U.S. SUPREME COURT MAILED 6-28-15

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)
NO. petition timely. PRO SE PETITION FOR REVIEW OF 3rd trial affirmance Direct appeal - See O'Neal v. Nevada, 134 S.Ct. 444, 187 L.Ed. 297 Case No. 13-6031 denied review October 15, 2013 with Nevada Solicitor General C. Wayne Hoole Files NOTICE OF APPEARANCE FOR STATE. See N.S.C. docket, 61631. U.S. Supreme Court notified N.S.C. (on docket #61631)

20. Do you have any petition or appeal now pending in any court as to the judgment attacked?
Yes - United States Supreme Court (certiorari review, mailed May 28, 2015.

21. Give name of each attorney who represented you.
Randy Pike; Patricia Palm; Jerell Thomas; Lance Maningo, Brian O'Neel - pre pet; Amanda Gregory; Matthew Carling.

22. Do you have any future sentences to serve....
No

(• See following SUPPLEMENTAL Grounds 1-13 -): (APPENDIX OF SUPPLEMENTAL EXHIBITS 1-25)

23. State concisely every ground on which you claim that you are held unlawfully.

2.) Trial counsel was ineffective in failing to challenge the •doctrine of the law of the case. This violated Petitioner's right to counsel, as guaranteed by Amendments 6 and 14 of the U.S. Constitution, see STRICKLAND v. WASHINGTON, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984), in violating petitioner's due process and equal protection pursuant 5th, 6th, 14th amendments. Strickland v. Washington, supra has been adopted in the state of Nevada as the standard. Strickland provides a two-prong test which includes (1) whether counsel's representation fell below an objective standard of reasonableness, and (2) whether defendant was prejudiced to the extent that, but for counsel's errors, there was a reasonable probability of a different outcome. Petitioner clearly asserts that the following grounds 2.) through e.) and 3.) A.) thru D.) will all be based on Ineffective Assistance of Counsel in violation of petitioner's right to counsel, as guaranteed by the 6th, 14th Amendment, thereby violating due process and equal protection pursuant 5th, 6th, 14th Amendments.

Ground 1

2.) • Doctrine of the law of the case was not challenged from the ORDER (exhibit 1) of Reversal and Remand, Nevada Supreme Court docket 53854.

• see McCaskill v. Nevada unpublished 2011 WL 6415183 (Nev 2011)(law of case)

Strickland's first prong is met by trial counselor's failure to file the appropriate motion, challenging[1] the law-of-the-case that was established April 7, 2010. • Thus, where a judgment is reversed by an appellate court: • 1.) the judgment is final upon all questions decided and these questions are no longer open to consideration;

• 2) the court to which the case is remanded can take only such proceedings as conform to the judgment of the appellate tribunal.

e.g.- (see State v. Haberstich, 119 Nev. 173 at 184, 69 P.3d 676 (2003))

(• The law of the first appeal is the law of all subsequent appeals where facts remain same.)

Here, in the instant case, the defense challenged the alternative means of the lesser included offense given, in the Fast Track Statement, on second degree murder. The state countered, with the trial court concurring, that the lesser included offense, defined by implied malice, was a correct statement of the law given many times in Nevada.[2] Additionally, the state raised the sufficiency of evidence claim by the "Jackson" standard. see Jackson v. Virginia, 443 U.S. 307, 319 (1979) (exhibit 2)(Fast Track Response, Issue 1, page 5, lines 14-17)

The ORDER OF REVERSAL AND REMAND answers both parties on direct appeal. Notwithstanding the argument concerning the "alleged" felony murder instruction, the court addressed the sufficiency of evidence raised by state, concluding that the burden of malice was not proved. The order reads, . . . "AND the evidence presented at trial did not support this theory of second-degree murder."

(• SCHAD v. ARIZONA, infra - MALICE MURDER AND FELONY MURDER EQUAL SINGLE CRIME.)

Strickland's second prong is met by prejudice resulting in another trial(s) on Statutory murder with "malice aforethought." The omission

(fn1: entering and receiving.) (fn2: Labastida v. Nevada, 112 Nev. 1[illegible])

of any defense, pertaining to the-law-of-the-first-appeal, infringes also, "stare decisis". Had the state and court been forced to address the law-of-the-case, a different outcome would have existed, thereby defendant not prejudiced with prosecutorial misconduct.

Unlike other cases that conclude specifically, that a new trial will commence in the decree, petitioner's conclusion recels that:

- "Accordingly, we (see CRAWFORD, 96 P.3d 751 (conclusion) 2nd rev.) ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order." (exhibit 1) (ORDER of REVERSAL AND REMAND)

At this point, the trial counsel should have made this clear case, supporting the reversal order on a viable protection of the decision.

Noting, the state wrongly charged murder via Criminal Complaint (exhibit 2) by "malice aforethought." The state alleged the malice, by the noticed separate source document of the willful and unlawful act of force, required for malice. (exhibit 4) ~~(BATTERY DOMESTIC VIOLENCE; ADMONISHMENT OF RIGHTS)~~ The battery act was listed as "stabbing" in the charging documents. (• Labastide, NC Nev 1982 (N.R.S. 200.020 and N.R.S. 200.010 are harmonious, unlawful act = malice))

After concluding the state's Petrocelli Hearing, on misdemeanor battery d.v. charges, enhanced only to a felony for punishment purposes, case C207835, the court allows the third misdemeanor battery d.v. to be introduced. The state immediately files an amended-information in another court room, later that day, unbeknown to defendant, dept. V. (exhibit 5) (Amended Information Feb. 10, 2011 OPEN MALICE MURDER W-DW.) This charged "open malice murder" by stabbing, supporting the unlawful (malice) act, with all lesser included offenses by various means, mens rea.

- Opening statement by State. (exhibit 7)(implied malice theory, pg 171)
Emphasizing the state charged one (1) single count of malice murder [Open] by the alleged "actus reus" of stabbing, however with all the various lesser included offenses, by lesser degrees of mens rea charged by alternative theories of criminal culpability. (exhibit 6)("Jury Instructions")
  - Specifically, "J.I." No. 3 charges malice murder by stabbing.
- J.I. No. 4 explains to constitute crime, there must exist a union or joint operation of an act forbidden by law and an intent to do the act. Here, the act was charged as stabbing with various means, mens rea.
- J.I. No. 12 explains defendant is accused of a open murder which includes first, the lessers of second, voluntary and involuntary manslaughter.
- J.I. No. 13, Murder is the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by various means. [mens rea]
- J.I. No. 14, Malice as applied to murder does not necessarily import ill will toward the victim, but signifies general malignant recklessness of others' lives and safety or disregard of social duty.
- J.I. No. 15 Express malice is that deliberate intention unlawfully to take away the life of another, post.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing "show" an abandoned and malignant heart.

- J.I. No. 18 MURDER OF THE SECOND DEGREE IS MURDER WHICH IS:

N.R.S. 200.010, (1) "200.020" —An unlawful killing of a human being with "malice aforethought", but without deliberation and premeditation, or [alternative theory #2 below]

N.R.S. 200.020 or 200.070 (2) —Where an involuntary killing occurs in the commission of an [malice] unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill.

Harmonizes, equal. see Labastida supra - 6 (c) -

• Note: (Emphasis, Attached is No. 24 re Involuntary Manslaughter, No Felony Elements
Felony murder per Rose, supra

• J.I. No. 19, Malice aforethought means the intentional doing of a wrongful act...

These instructions allowed the state to properly construct, by due process, the law of the trial, thereby charging acceptable alternatives to satisfy the mens rea required for murder of the second-degree based mainly on implied malice. Harmony exists between the states argument, made in their Fast Track Response, (exhibit 2, pg. 9, line 6) that J.I. No. 18 was "conceded" to be implied malice by "showing" of implied malice according with J.I. No. 15 (exhibit 6, line 5) which instructs that malice may be implied when... "show" an abandoned and malignant heart.

(Malice - N.R.S. 200.020) J.I. No. 18 (2) was the state's single concept of malice aforethought, implied. The statutory alternative as provision two (2) was the factors indicating malice, by the unlawful act which naturally tend to destroy the life of a human being. The implied malice instruction breaks into the physical component and the mental component. (actus reus and mens rea) Remembering, the actus reus stays the same for all levels or degree of homicide charged.

• See Barker v. State, 30 P. 2d 1103, 117 Nev. at 686

The actus reus listed as stabbing and noticed by the battery domestic violence charged already apprised all as to the method; pursuant of. (exhibit 4) (• NRS 200.481 Battery defined: "any willful and unlawful act of force")

there the abandoned and malignant heart, mens rea, is listed in J.I. No. 18 (2) as:

..." which act is intentionally performed by a person who "KNOWS" that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill. (• See SCHAD, 111 S. Ct. at 2506) (malice aforethought, "Knowledge that an act causes death.) Nevada recognized in Crawford v. Nevada, 121 Nev. 746 Fn. 8 that they

have adopted the United States Supreme Court's rationale in SCHAD v. ARIZONA, 501 U.S. 624 (1991)(Plurality)(111 S.Ct. 2491) SCHAD, 111 S.Ct. at 2503,

" If however, two mental states are supposed to be equivalent means to satisfy the mens rea element of a single offense, they must reasonably reflect notions of equivalent blameworthiness or culpability[.]

SCHAD, 111 S.Ct. at 2497.

..." In holding that the Government was not required to make the choice in the alternative,"

Information need not specify which overt act, was means by which crime was committed, for alternatives.

IN a pre-Schad decision by the Utah Supreme Court of State, MARQUEZ v. Gunn and Attorney General of Colorado, 1994 U.S. App. LEXIS no. 93-5525 (9th Circuit June 21, 1994) "quoting" State v. Russell, 733 P 2d 162, 167-68 (Utah 1987),

~~concluding that the Sullivan rule applied to~~ [3]
alternative theories of second-degree murder.

As alternative means, Express and/or IMPLIED malice were constitutionally acceptable alternatives to satisfy the mens rea requirement (element) for the single crime of second-degree murder in that express and implied malice reflected equivalent blameworthiness.

Petitioner now needs to manifest that the state charged petitioner with Open "MALICE" Murder, with the jury returning an implied acquittal, when returning the second-degree murder W.O.W. jury verdict by the general verdict form utilized.[4] This lesser included guilty verdict

(fn3: People v. Sullivan, 173 N.Y. 122, 65 N.E. 989) - 6(e) - (fn4: exhibit 9, general verdict form)

From (6a)

(Continued fn:2 Labastida v. Nev, 115 Nev 290; STATE v. HALL, 54 Nev 213; Barton, supra)

was based upon an unintentional, unpremeditated and undeliberated killing by the actus reus of stabbing, with the mens rea of the abandoned and malignant heart implied malice. Being the lesser included offense, to the charged first-degree, the unlawful act, noticed as a battery, was only the alleged felony unlawful act, being assaultive in nature, that merged within the malice for murder. See Rose v. State, 255 P.3d 291, 297 (Nevada Supreme Court Sept. 29, 2011) quoting People v. Soran Chun, 203 P.3d 425, 434 (2009) ("Thus, certain underlying felonies 'merge' with the homicide and and cannot be used for purposes of felony murder." Id. 203 P.3d 434-35)

Moreover, the State makes the judicial admission that J.I. 9.15 provision (2) was the single Except of implied malice - This issue was decided on direct appeal. Judicial estoppel clearly applies. The state cannot come back and state it was something different. see 9th Cir. Castillo-Baez, 483 F.3d 690 (2007) at 699 FNS (AUSA who made a truthful and accurate concession on record... evidence of government did not meet border beyond reasonable doubt... new AUSA completely reversed its position... 9th notes this troubling reversal of position may violate our established judicial estoppel doctrine)

- See also FIVE STAR CAPITAL CORPORATION v. RUBY, 124 Nev. 1048, 194 P.3d 709 (2008) (Claim preclusion and Issue Preclusion - GROUNDS FOR ESTOPPEL)

IN the Fast Track Response, (exhibit 2) (Issues II, pgs 7-9 and VI pg 14) the state clearly admit J.I. 18 (2) is nothing more than showing implied malice.

Malice aforethought is charged and defined by N.R.S. 200.020. The state's opening and closing argument express the unlawful act as stabbing. The Amended Information alleges the unlawful act as "and with malice aforethought" noticed as the battery d.v. charge.

-6(f)-

IN Evans v. Mich., 568 U.S. __, 185 L.Ed.2d 124 (2013) This court has held that a judicial acquittal premised upon a "misconstruction" of a criminal statute is an "acquittal on the merits ... [that] bars retrial." See Arizona v. Rumsey, 467 U.S. 203, 211 (1984) See "no meaningful constitutional distinction between a trial court's "misconstruction" of a statute and its erroneous addition of a statutory element, we held ... is an acquittal..."

Most relevant, we have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. • Burks v. U.S., 437 U.S. 1; U.S. v. Martin Linen Supply Co., 430 U.S. 564, 571 (n 11) [Trial court instructional error irrelevant for dbl. jep.]

Regardless of any improper argument concerning J.I No. 18, arguendo, equal culpability with equal blameworthiness remain and held that only one single crime was defined, SECOND-DEGREE MURDER.

The state cannot change its theory of intentional unlawful stabbing as the facts pass. ~~The Amended Information is constitutionally binding~~, i.e. - malice OPEN murder.

When the Nevada Supreme Court ruled that, "AND the evidence presented at trial did not support this theory of second-degree murder.", • See • Yeager v. United States, 129 S.Ct. 2360 (2009) one simply has to ask, "what did the theory consist of"? Looking at J.I. No 18 provision (2) (exhibit 6), this theory held that a defendant who commits the intentional act who "KNOWS" that his conduct endangers the life of another, ... is the factor showing "implied malice". Most importantly, the State "concedes" this in Fast Track Response, (exhibit 2).

The reversal order therefore is tantamount to an acquittal for implied malice. The elements of intentional, act, unlawful, and knowledge are barred. Malice aforethought was charged to the jury as J.I. No. 13. Malice may be express or implied. The state admitted on record, that was their malice showing, by the elements and factors in the provision, with the trial court CONCURRING.

When the Nevada Supreme Court stated, "we remand for proceedings consistent with this ORDER, that did not mean another trial on the same statutory charge, rehashing the same evidence. There was no new evidence. This is also finally admitted by an attorney in his letter. see (exhibit 8) (dated 4-22-2015)

Additionally, the states lists a "false" case, phantom, as alleged new discovery, Case no. c225165, when petitioner has never been charged with such a case number. All evidence was rehashed.

~~Finally, the closing argument of the first trial manifests several key~~ matters of law concerning the law of this case. State explains malice can be implied or "the jury can imply malice when all of the circumstances of a killing "show" an ABANDONED AND MALIGNANT HEART." (exhibit 11) (ROA 000298, RDT pg 135 lines 8-14)

That, "where the involuntary killing occurs in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being, the offense is murder." (exhibit 11) (ROA 298, pg. 137 lines 25- to ROA 299, pg. 136, lines 1-3) This matches J.I. No. 18 (2), which matches the state's opening argument. (see exhibit 7)

State then describes "act" for jury. ... "It was willful. The act of STABBING Victoria was willful." (exhibit 11)(ROA 299, ROT pg. 139, lines 22-23)

Explaining malice forethought the state charges, "... And there was definitely malice aforethought, either express, definitely IMPLIED. OKAY." ... (exhibit 11)(ROA 299, ROT pg 140, lines 2-3)

State tells "second degree would apply if defendant acted intentionally." (exhibit 11)(ROA 299, ROT pg. 30, lines 16-17)

Closing, final argument, by state; "The law says you determine a person's intent at the moment they commit the act... it doesn't make the underlying act [merged] any less criminal. (exhibit 11)(ROA 309, ROT pg. 176, lines 16-21)

"That's certainly circumstantial evidence of a battery or something [malice] that precipitated a stabbing." (exhibit 11)(ROA 308, ROT pg. 177, lines 1-2)

Finally, the state says, "... but consistent with an accidental stabbing where you fall on top of the person holding the knife." (exhibit 11)(ROA 309, ROT 179, line 12-15)

The case is clear, and caused by an external force, my then appointed attorney. Failure to challenge any action by the state, to proceed again, prejudiced defendant and if denied by the trial court, the law-of-the-case would of had more than a reasonable probability of success on appeal, being freshly reversed. (exhibit 1) The fact also, that the U.S. District Court (exhibit 12)(case 2:11-cv-02261-CMK-ver January 6, 2012) divulged that the collateral estoppel doctrine appeared viable validates any I.A.C. claim on this issue and others. Bolstering this issue

is the Ninth Circuit's ORDER, (exhibit 13) (filed April 13, 2012) declaring, by the Certificate of Appealability panel, the double jeopardy claim was valid, debatable and granted an appeal notwithstanding the procedural issue causing the dismissal (CAUSED) by this same attorney. IN FACT, U.S. District Judge Navarro explains that the attorney raised the wrong double jeopardy operative facts and we all know why. (exhibit 12, pg 4, lines 10-14) The 9th Circuit ORDER states they find at "least" one federal constitutional claim debatable among jurists of reason. That's because Mr. O'Keefe had raised a I.A.C. claim showing how the double jeopardy violation arose.

The fact that the state proceeded then caused the AFFIRMABLE ORDER, of the third wrongful trial while appeal is still pending. (exhibit 14) (FILED AFTER RE-ZAN SCN No. 6163)

The double jeopardy claim affirmed also becomes challenging. The N.S.C. states the state was allowed to proceed on another theory, alternative, of second-degree murder that was presented at his first trial and alleged in the charging document.

Pointing out, there is and was only one theory and that theory was already given. IMPLIED MALICE, fin.

The Nevada Supreme Court was not made aware of the retried Battery Domestic Violence: ADMONISHMENT OF RIGHTS. Malice was the unlawful act alleged by the stabbing.

Any implied malice instruction must be estopped. The evidence presented at trial did not support the state's malice theory. Here, State Decisis

Concerning general verdicts, when two (2) or more verdicts, for any degree, are available, an appellate court cannot reverse even if there exists abuse of discretion in charging another alternate theory. When only one theory is challenged the other remaining theory still underwent jeopardy. See • K-MART CORP. v. Washington, 109 Nev 1180, 866 P.2d 274

There are three sides to every story. One was the Fast Track Statement, misguided, and the second was the state's truth, on the instruction being only the concept of implied malice in the Fast Track Response. The third side was the decision made on direct appeal, #33659, being the doctrine of the law of the case, law of the first appeal.

This stands again that any issue decided is no longer open for consideration. There was no new evidence of facts warranting change. As a matter of fact, there was less evidence presented in the second and third trial, but only beefed up, refinished evidence, trying to make a better sound, argument. This evidence was barred.

~~When the Nevada Supreme Court stated for that issue decided, that the evidence presented at trial did not support [malice] the issue became decided.~~ (See FIVE STAR CAPITAL CORP. v. Ruby, supra (Nev.))

Proof of this is even made by the state in, (exhibit 15) (second-trial Rough Draft transcripts - J.T.) (Jury Trial #2 day 7 - Tuesday August 21, 2001, pg - 57)

The state claims the Nevada Supreme Court knows when a involuntary manslaughter would only become a second-degree murder. Also, the state admits the Nevada Supreme Court decided this issue and the evidence didn't support it. (exhibit 15, EOT, pg. 99 lines 7-23) Collateral / Judicial Estoppel applies.

Conclusion Ground (2)

Humbly, petitioner seeks protection pursuant the 14th under Berton v. Maryland infra.

The petitioner places emphasis and wishes this Honorable Court to now recognize that this state petition relates back to the very heart and core of his initial (direct appeal) pretrial habeas corpus 2241 petition, filed December 29, 2011 in the U.S. District Court preceding the third trial petitioner contends that proceeded in want of jurisdiction. Despite the U.S. District Court's dismissal, the appeal is still pending. The 9th Circuits decision was appealed on May 28, 2015 to the U.S. Supreme Court by a pro-se Certiorari request.

• IN Conclusion of this ground, petitioner incorporates by reference, specifically exhibits 1 - 25 attached in supplemental appendix, all points, authorities, arguments, opinions, decisions which are now hereby repleaded in their entirety into this ground (2).

• PRAYER Whereby, in meeting clearly the standards set by Strickland, as demonstrated and argued in ground (2) supported by ORDERS and exhibits, petitioner prays this honorable court will grant him an evidentiary hearing and appoint him counsel that will assist in manifesting the truth, professionally, thereby being granted relief under this immediate action.

Noting, the law library offers no access and any trained paralegals or clerks to assist. Petitioner wishes to have an experienced attorney who will truly assist in divulging constitutional errors manifesting a fundamental miscarriage of justice.

Mr. O'Keefe still contends that he is clearly being held in violation of the Constitution and the laws or treaties of the United States. Genesis of the double jeopardy violation was by the State proceeding on the same statutory offense. -6(1)-

Ground 2

b) Trial counsel was ineffective for failing to invoke the doctrine of collateral estoppel, on the elements of Jury Instruction No. 18, which referred to the factors, that the state concedes to in Fast Trak Response, in Issues IV and VI, that "shot" implied malice by the abandoned and malignant heart mens rea instructed. This violated Petitioner's right to counsel, as guaranteed by Amendments 6 and 14 of the U.S. Constitution, see Strickland v. Washington, supra thereby violating petitioner's due process and equal protection pursuant 5th, 6th, and 14th Amendment.

Counsel failed to argue; the two prongs of Strickland, supra provides (1) whether the counsel's representation fell below an objective standard of reasonableness, and (2) whether defendant was prejudiced to the extent that, but for counsel's errors, there was a reasonable probability of a different outcome. The "cause" is proven by failure to object, orally or by motion that the elements were barred on first direct appeal. By failing to protect petitioner's due process with equal protection afforded, by the express dictates of Boykin v. Maryland, 395 U.S. 784 (1969), prejudice resulted by the state's continued harassment in another prosecution on malice implied, murder.[5] The state filed their new Second Amended Information (exhibit 19) charging again murder by malice aforethought. The state failed to consider the test adopted under Blockburger v. U.S., 284 U.S. 299 (1932) because the charging documents juxtaposed would clearly manifest that the state had proceeded on the same elements, actus reus and mens rea, statutory crime, for the same alleged tragic incident of November 5, 2002 acquitted of. Collateral Estoppel or issue preclusion bars the ultimate fact of malice to be relitigated.

(fns: State filed opposition which indicated on page 4, only "malice" murder (exhibit 18))

The initial order reversing the case (exhibit 1) had decided the "issue" presented on direct appeal. Again, the state concedes this, then with knowledge, in exhibit (15) fifteen, page 67.

When the order stated, "AND the evidence presented at trial did not support "this theory" of second-degree murder".

What theory? The state's asserted theory (exhibit 2) that it was the factors indicating "Malice" as explained in Rose v. State, 255 P.3d 291, 294, FN1.

The elements of petitioner's J.I. #18 (2) was the factors defining NRS 200.020.

The language of NRS 200.020 anyway has been determined by the Nevada Supreme Court as being harmonious. If it doesn't support one theory, then it doesn't support murder in the second degree.

The state and defense try to persuade all that they were proceeding on a felony-murder theory by the felony-murder rule. This felony murder also is explained in Rose, supra that it must be an instruction also indicating the elements of second-degree felony murder explained in Morris, Nitke 109, 659 P.2d 852. These additional elements also must be appended to NRS 200.020, the involuntary manslaughter instruction. Petitioner's involuntary manslaughter instruction, numbered 24 (exhibit 6), did not have these elements appended. This bolsters the fact that J.I. #18 was nothing more then the factors indicating implied malice.

According to Noonan v. State, 115 Nev. 184, 980 P.2d 637 (1999) they declare also that in Nevada, the involuntary manslaughter instruction can include felony murder because NRS 200.020 includes the crime of felony murder.

Finally, the Supreme Court ruled in Fire Star Capital Corp. v. Ruby, supra about the proper time to invoke estoppel to either issue preclusion or claim preclusion. Therefore, it becomes quite apparent petitioner's due process was violated when his trial counsel failed to invoke estoppel on malice aforethought specifically challenging to state in charging the elements of, KNOWLEDGE, UNLAWFUL, ACT, and intent to do the act itself.

(incorporated by reference) In conclusion of this ground, ie, (b), petitioner incorporates specifically exhibits 1-22 attached, with all points, authorities, arguments, opinions, decisions which are now hereby repleaded in their entirety into this ground (b).

PRAYER

Whereby, in meeting the standards set by Strickland, as demonstrated above in ground (b), petitioner prays this honorable Court will grant him an evidentiary hearing and appoint him counsel that will assist in manifesting the truth, professionally, thereby being granted relief under this ~~immediate action~~. Noting again, there is no access to the law library, system is deficient; by byte request.

Equal protection to all is mandated by the 14th Amendment due process. see Barber v. Maryland, 395 U.S. 784 (1964). Petitioner states emphasis that this issue relates back to the core of the pretrial habeas corpus petition filed under 28 U.S.C. § 2241(c)(3). This petition is still on direct review viz Certiorari to the U.S. Supreme Court from 9th Circuit case number 12-15211 mailed 5-28-15.

GROUND 3

C.) My trial attorney was ineffective for failing to challenge the state "retried" no new actus reus to support implied malice's "unlawful act." Repeated same theory. This violated Petitioner's right to counsel, as guaranteed by Amendments 6 and 14 of the U.S. Constitution. see Strickland v. Washington, supra thereby violating petitioner's due process pursuant to 5th 6th, and 14th Amendment with equal protection.

Counsel failed to challenge the state's new filed second amended information (exhibit 19), filed under erroneous case number C2500 630. This charging document was not underpinned by any "notice" of any felony unlawful act, as previously filed for the first trial. (exhibit 4)

This clause meets the first prong of Strickland. The second prong is met by the pure prejudice of the prosecutorial misconduct in the stress, harassment, embarrassment, expense, anxiety and loss of liberty.

The law clearly dictates every crime consists of an unlawful act and an intent to do the act, knowingly.

Implied malice is primarily an unintentional, unpremeditated, undeliberated killing in the Commission [or resulting from] of an unlawful act, natural consequences are dangerous to life. This is the physical component.

The trickery is when one is charged with malice murder by an alleged battery act, actus reus, the battery becomes the ultimate element of the charged malice murder. Being assaultive in nature, it merges with, by law for second-degree, the murder.

Here, when the Nevada Supreme Court reversed, (exhibit 1),

the unlawful act was battery as the constitutionally charged Battery. (exhibit 4) This is also confirmed by the state's opening statement, (exhibit 7) and case in chief, elicited out by jury instructions and closing argument. (exhibit 11)

This omission by the state violated not only procedural due process, but embarks substantive due process being completely unfair. Attorney's failure to challenge allowed the state actors to behave as mischievous prosecutors destroying Mr. O'Keefe equal protection of due process pursuant the 14th Amendment of the U.S. Constitution.

(INCORPORATING BY REFERENCE)

IN CONCLUSION, ground (c), petitioner incorporates specifically exhibits 1-20 attached, with all points, authorities, arguments, opinions, decisions which are now hereby repleaded in their entirety into this ground (c).

• PRAYER

Whereby, in meeting the standards pursuant Strickland, as demonstrated above in ground (c), petitioner prays this honorable court will grant him an ~~evidentiary hearing and appoint counsel that will assist, in~~ manifesting the truth, professionally, thereby being granted relief under this immediate action.

Noting again, there is no law library access based on a distinct system.

Moreover, petitioner again places great emphasis in that this issue is tried and relates back to the core of his, still pending, pretrial habeas corpus pursuant 28 U.S.C. § 2241 (c)(3) direct review via Certiorari review to the U.S. Supreme Court mailed 5-20-15.

Ground 4

d.) Trial Counsel was ineffective in failing to challenge the rehashing of evidence and using misdemeanor(s) 3rd in its case-in-chief. This violated petitioner's right to counsel as guaranteed by Amendments 6 and 14 of the U.S. Constitution. see STRICKLAND v. WASHINGTON, supra thereby violating Petitioner's due process pursuant the 5th, 6th, 14th Amendment with equal protection.

Counsel failed to challenge the state rehashing all evidence subsequent the Reversal order stating, "AND the evidence presented at trial did not support this theory of second-degree murder." (exhibit 1)

This was caused by the attorney meeting now the first prong of Strickland. The prejudiced resulted in another two trials all using the same evidence which clearly satisfies the second prong.

~~The law of the case dictates that once an issue has~~ been litigated it is final. No new facts or especially the same evidence may be used to give a more learned appeal argument on the same claim decided, with or involving the same parties. see FIVE STAR CAPITAL CORP v. Ruby, supra (Nev 2008)

Additionally, in U.S. v. Castillo-Basa, supra (9th Cir. 2007) the court explains that collateral estoppel applies to evidentiary facts. id. at 485 U.S. 897 FN4.

Rehashing of evidence previously presented in an issue that has been decided in favor of defendant justifies

invoking the estoppel doctrines. *See Ashe v. Swenson, 397 U.S. 436, 443 See also U.S. v. Sacco, 590 F.2d 404, at 407. (Such a rehashing of evidence previously presented would clearly be prohibited by the collateral estoppel doctrine.

Rehashing of evidence is prohibited by the Double Jeopardy Clause. See also U.S. v. Fleming, 822 F.2d at 762

The state of Nevada not only rehashed all evidence already used, they tell an untruth and create a fake discovery alleged under a bogus case number, * 020565, (exhibit 16).

A post conviction attorney, appointed by the Court, also divulges to me by letter that quote, "You are absolutely correct that the evidence in all the trials is the same, albeit rehashed with "more beefed up argument." (Exhibit B)

A key argument is that the state proceeded with two more trials on rehashed evidence. The state even had less, and the second trial jury hung. The state was prohibited from using all of the same evidence. The attorney failed to protect petitioners rights clearly.

When the state noticed their "second" petrocelli hearing, this hearing was a sham, for the state presented to the court the exact same evidence reviewed in the first petrocelli hearing held February 10, 2009. My attorney was ineffective in not realizing the evidence was rehashed and a fake case despite me even telling her case 020565 was not my case.

This refreshing of misdemeanors enhanced also to a felony was a violation. Misdemeanors cannot be presented. NRS. 50.095

Attorney performance fell below an acceptable standard. Any other attorney would love to be able to stop the state from prosecutorial misconduct in proceeding with no new evidence.

In conclusion of ground (d), petitioner incorporates by reference Specifically exhibits 1-20 attached, with all points, authorities, arguments, opinions, decisions which are now hereby replead in their entirety into this ground (d).

• Prayer

Whereby, in meeting the standards pursuant Strickland, as demonstrated above in ground (d), petitioner prays this honorable court will grant him an evidentiary hearing and appoint counsel that will assist in ~~manifesting the truth, professionally, thereby being granted~~ relief under this immediate action.

Noting again, there is no access to law library based on a defunct Kyte system.

Moreover, petitioner constantly points out this petition relates back to the core of the initial direct review of his pretrial habeas corpus matter pursuant 28 U.S.C. § 2241 (d)(2) which is currently submitted for certiorari review by the U.S. Supreme Court mailed 5-28-15 from 9th Circuit decision rendered in case 12-15271.

GROUND 5

e.) Trial counsel was ineffective for failing to raise correct double jeopardy operative facts. This violated Petitioner's right to counsel as guaranteed by Amendments 6 and 14 of the U.S. Constitution. See STRICKLAND V. WASHINGTON, supra thereby violating petitioner's collateral estoppel made embodied in the 5th amendment, which protection is made applicable to the states by the 14th amendment pursuant Benton v. Maryland, 395 U.S. 784, 795-96.

Nevada has adopted Strickland, supra and it's two (2) prong test. Here, the first prong was fulfilled as the attorney being the external force, and failing to raise the correct double jeopardy operative facts, at that time. This is below any reasonable standard in which an attorney would perform. The U.S. District Court in preview of petitioners habeas matter under § 2241, even recognized this omission clearly. (exhibit 12)(Page 4, lines 10-11, "...not the same claim!")

The second prong is clearly met for a myriad of reasons. Prima facie evidence of the U.S. orders clearly establish proof far beyond any reasonable doubt. The Ninth Circuit Court of Appeals even issued a Certificate of Appealability recognizing the initial "I.A.C." claim petitioner had made. (exhibit 13)(COA) See also now (exhibit 22)(Attorney's Petition for Writ of Mandamus S.C.N. No. 58161)

IN the 9th order of "COA" they opine they conclude that petitioners pretrial habeas corpus petition stated at least one federal constitutional claim, ..., namely, a double jeopardy violation.

All jurist were apparently wondering that in the first instance, why the heck wouldn't any attorney filing a double jeopardy claim present any/all of the interrelated doctrines, at that time, for all judicial economy, time!

The 9th Circuit had just conducted a very similar case on the double jeopardy doctrines for review. See Wilson v. Bellegare, 554 F.3d 816, 822-23 (2009) The court explain the FIFTH AMENDMENT'S protection against double jeopardy, is made applicable to the States by the 14th Amendment, (Benton) bars both 1) same offense; 2.) issue preclusion; 3.) termination of jeopardy.

Petitioner contends that he in fact meets all (3) doctrines above. #1.) The state charged same offense, statutory charge malice murder; (exhibit 9) #2.) the issue on malice implied was litigated and ruled in favor of the petitioner on implied malice, act and intent incorporated in J.I. 18; (exhibit 1); #3.) termination of jeopardy on malice required for second-degree murder. (exhibit 1) (ORDER READS, " AND the evidence didnot support... J.I. 18)

Simply, the Court needs to run a Blockburger test on the two Amended INDICTMENTS concerning the Statutory crime and elements. See (exhibit 5) juxtaposed to (exhibit 9) considering (exhibit 1) ! simple!

The attorney could have referred to Five Star Capital Corp v. Ruby, supra (Nev. 2008) for State direction concerning claim preclusion and issue preclusion - (Res Judicata - Collateral Estoppel) When to invoke estoppel.

However, the new appointed attorney raises that another trial, specifically the third, from the second trial mistrial as the operative facts. Petitioner was claiming the second trial, based on above, was a violation of the double jeopardy clause when the second jury panel was sworn in on August 25, 2010. Properly, review should be by the trial court that helmed the court of both trials involved in this claim. This Court is also aware all evidence was rehashed and the court was aware the issue was already decided.

Particularly troubling is the court appointed attorney makes several wrongful claims and omits issue "F" from defendant's Fast Track Statement, * 53859. First, she omits issue "E", which the state answers as E.I. #18 being only implied malice and a correct statement of the law with the judge concerning - (exhibit 2)(page 14) Second, attorney claims in he writ, (exhibit 21)(page 25, lines 20-25) quote,

— "... there was no good cause for the further delay caused by redetermining the law-of-the-case to allow "new" evidence for which inadequate discovery had been provided until after defender cell." ... This would mislead any judge in the future thinking there was new evidence. Wow!

Third, the new evidence was bogus! Prosecutorial misconduct. This new alleged discovery was the fake case number. (exhibit 10)(discovery request (FAKE-FALSE) case No. C265165)

Fourth, the Second petrocelli hearing was on the exact evidence. Judge Villani ruled twice, during appeal to 9th circuit after COA was granted, that the same 3rd misdemeanor only enhanced to a felony could be used against even the ruling of the law of the case. You cannot bring in any batteries, especially not alleged in charging document. Moreover, issue preclusion barred it, Fin!

The trial court was buffaloed by the state. At least, I want to believe this in my heart that no man could, as a judge, allow such ungodly acts as an honorable man, "Juror"!

IN Conclusion of ground (e.), petitioner incorporates by reference specifically exhibits 1-22 attached, with all points, authorities, misapplied arguments, good arguments, correct legally arguments, opinions, decisions, which are now hereby repleaded in their entirety into this ground (e).

My attorney's performance fell unacceptably below the Strickland "or any" standard. I only want to correct and forgive, all.

• PRAYER

Whereby in UNDISPUTEDLY meeting the standards of EQUAL PROTECT afforded when proven, the Strickland prongs have been satisfied in the I.A.C. claim demonstrated above in ground (e). Petitioner prays this honorable court will grant him an evidentiary hearing if needed, and appoint counsel that will assist in manifesting the ugly truth, gravely and professionally; thereby granting relief under this immediate action.

Re-emphasizing, there is no sufficient law library system at U.C.C. No physical access, byte system, and no trained staff to assist

"Legally," pointing out "this action" is directly tied to the very heart and core of the still pending pretrial federal habeas corpus petition filed under 28 U.S.C. § 2241 (c)(3) that raised the specific argument concerning the I.A.C. of same counsel and the double jeopardy claim in act and intent, same offense. Certiorari review filed May 28, 2015 from appeal of 5th Circuit case No. 12-15271.

Ground 6

f.) The district court erred in determining that Involuntary Manslaughter is not a lesser included offense to second degree murder failing to instruct jury. This violated Petitioner's Constitutional due process thereby denying equal protection of the law pursuant the 5th and 14th Amendments and Nevada Constitution and NRS 175.501, and FEDERAL RULE 31(c).

- After filing and proceeding in the first trial, on an OPEN malice murder charge including all lessers, in the first instance, the trial court then violates not only petitioner's due process, but infringes on the judicial estoppel doctrine he, "alone," set an approved in the first trial, when allowing involuntary.

First, N.R.S. 200.070 is embodied and approved as a lesser included to second-degree, especially when there exist undisputable proof very beyond a shred, being the only requirement for such instruction to be given. See Rosas v. State, 122 Nev. 1258, 1263-69, 148 P.3d 1101, 1105-09 (2006) (setting forth requirements for entitlement to instruction on lesser included offense); ~~(In the Matter of Seven, 31 Nev. 531, 535, 103 P. 1073, 1074)~~ (Involuntary Manslaughter is a lesser degree of [second] murder). (• see Barton, 117 Nev. 687 citing Lisby v. State, 82 Nev. 183 (1966)) Petitioner's proposed instruction was appropriately tailored to his theory given in the first trial and specifically to the facts asserted, self-defense resulting in accidental death. see Byars v. State, 124 Nev. ___, 186 P.3d 1052, 1062 (2008) (instructions should be tailored to case)

Noting that this proffered instruction was an available alternative by NRS 200.070 (1) and a correct statement of law. NRS 200.070 (1) defines this lesser included alternative as such, being relevant here:

(NRS 200.070 (2))

"[I]nvoluntary manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner, but where the . . .

O'Keefe's proposed change:

Involuntary manslaughter is the unintentional killing of a human being without malice aforethought, but where the commission of a lawful act, which might probably produce such consequence in an unlawful manner.

If Brian O'Keefe unintentionally or accidently killed Victoria Whitmarsh during a lawful act, but in doing so acted with wanton or reckless disregard for human life that is not of the extreme nature that will support a finding of implied malice, then the crime is involuntary manslaughter and not second-degree murder.

Again, this is a correct statement of law tailored to the specific facts, evidence, and testimony. ~~Involuntary manslaughter requires proof that the defendant acted with only gross negligence, defined as "wanton or reckless disregard for human life" but not of the extreme nature as will support a finding of implied malice.~~ See United States v. Cleave, 560 F.3d 963, 973 (9th Cir. 2009); Cal. Jury Instr., Crim. (CALJIC), 7th ed., section 8.51.

The (3) experts ruled and testified, at 2nd trial, that suicide or accident could (not be) ruled out based on the physical evidence of the case. (Exhibit 21) (page 20 lines 11-24) Again, could not be ruled out. Emphasis. The Nevada Supreme court already also had ruled the evidence presented at trial did not support second-degree murder.

Self defense itself has been ruled to negate malice, even an honest unreasonable amount of force. There was no evidence of any domestic dispute for there was none. Testimony explained Mr. O'Keefe had dropped Mr. Whitmarsh and the police stepped possible and kicked Mr. Whitmarsh when apprehending petitioner. The police were unaware of Mr. Whitmarsh's sickness and history of suicides and acts of cutting with knives and scissors. (See exhibit zz)(Motion - History.. suicides .. cutting) They especially were unaware of her prior outbursts and attacks on her estranged husband and her current mandated attendance in anger management.

As appointed counsel did represent in her Writ #sec9 (exhibit zi)(page 30, lines 6-19) the evidence clearly supported a finding that petitioner may have been cut in self defense, by grabbing the blade. Mr. O'Keefe told police victim tried to stab him, fin. Extreme intoxication also played a vital role in which the police committed perjury in denying the existence of the use of force, which divulged, as a matter of the court record, petitioner was extremely intoxicated. This specific discovery request was also a Brady Violation.

Despite all, the denial of Petitioner's right to have the jury instructed on his theory of an accident in self defense, was an arbitrary unreasonable determination of facts that are are clearly contradicted by "Clear and Convincing" evidence IN THE RECORD of my case, wrongfully charged by State. Recent law; it is also unreasonable for a state to resolve credible disputed issues of material fact without holding an evidentiary

The State contended that the evidence would explain why Whitmarsh returned to a relationship with O'Keefe, 14 APP 2555-57, but this was irrelevant, and delay related to this evidence is not supported by good cause.

II. DUE PROCESS REQUIRES JURY INSTRUCTION ON INVOLUNTARY MANSLAUGHTER.

The district court erred in determining that Involuntary Manslaughter is not a lesser included offense to Second-Degree Murder. 12 APP 2076. The denial of O'Keefe's request for an Involuntary Manslaughter instruction deprived him of constitutional due process. All of the elements of Involuntary Manslaughter are included in Second-Degree Murder, and some evidence supported the finding of Involuntary Manslaughter. See Rosas v. State, 122 Nev. 1258, 1263-69, 147 P.3d 1101, 1105-09 (2006) (setting forth requirements for entitlement to instruction on lesser included offense); In the Matter of Somers, 31 Nev. 531, 535, 103 P.1073, 1074 (1909) (Involuntary Manslaughter is a lesser degree of Murder). O'Keefe's proposed instruction was also appropriately tailored to the facts in this case. See Brooks v. State, 124 Nev. ___, 180 P.3d 667, 662 (2008) (instructions should be tailored to the case).

O'Keefe's proposed instruction provided as follows:

> Involuntary manslaughter is the unintentional killing of a human being without malice aforethought, but in the commission of a lawful act which might probably produce such consequence in an unlawful manner.
>
> If Brian O'Keefe unintentionally or accidentally killed Victoria Whitmarsh during a lawful act, but in doing so acted with wanton or reckless disregard for human life that is not of the extreme nature that will support a finding of implied malice, then the crime is involuntary manslaughter and not second-degree murder.

7 APP 1057. This instruction was a correct statement of the law. NRS 200.070(1) defines involuntary manslaughter, as relevant here:

> [I]nvoluntary manslaughter is the killing of a human being, *without any intent* to do so, in the commission of an unlawful act, or a *lawful act which probably might produce such a consequence in an unlawful manner*, but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder.

NRS 200.010(1) provides that murder is the unlawful killing of a human being with malice aforethought, either express or implied. NRS 200.020(1) defines express malice as "that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." The crime of Second-Degree Murder may involve an intentional killing with express malice but without the admixture of premeditation and deliberation, i.e., a killing that is the result of passionate impulse but not within the definition of manslaughter. Byford v. State, 116 Nev. 215, 236 & n.4, 994 P.2d 700, 714 & n.4 (2000). The alternative form of Second-Degree Murder relevant here is based on implied malice. Malice is implied "when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." NRS 200.020(2). "Abandoned and malignant heart" refers to an extreme recklessness regarding homicidal risk. Collman v. State, 116 Nev. 687, 712-13, 7 P.3d 426, 442 (2000). See also Keys v. State, 104 Nev. 736, 738, 766 P.2d 270, 271 (1988) (implied malice signifies a general malignant recklessness of others' lives). For an implied malice murder, where the felony murder rule is not applicable, the defendant must intend to commit acts that are likely to cause death and that show a conscious disregard for human life. Collman, 116 Nev. at 716, 7 P.3d at 444; United States v. Mottweiler, 82 F.3d 769, 771 (7th Cir. 1996) (criminal recklessness requires that the actor is conscious of a substantial risk that the prohibited events will come to pass).

In contrast, Involuntary Manslaughter requires proof that the defendant acted with gross negligence, defined as "wanton or reckless disregard for human life" but not of the extreme nature as will support a finding of implied malice. United States v. Crowe, 563 F.3d 969, 973 (9th Cir. 2009); Cal. Jury Instr., Crim. (CALJIC), 7th ed., Section 8.51.

The evidence here supported a finding that O'Keefe may have been cut by grabbing the knife blade in self-defense, 10 APP 1590-94, 1596. He told police that Whitmarsh tried to stab him. 10 APP 1699. There was disarray in the bedroom indicating a struggle. O'Keefe was extremely intoxicated and failed to respond appropriately once Whitmarsh was injured. A jury could find from this evidence that O'Keefe acted in self-defense but in a grossly negligent manner. The denial of O'Keefe's right to have the jury instructed on this lesser offense unfairly risked conviction, and, combined with the prosecutorial misconduct, likely led to the deadlocked jury. See Rosas, 122 Nev. at 1264, 147 P.3d at 1106 (instruction on lesser is required because of the "substantial risk" that a jury will convict despite a failure to prove the charged offense if the defendant appears guilty of some offense). If O'Keefe is required to stand trial again, Due Process requires that he be granted the Involuntary Manslaughter Instruction.

CONCLUSION

For all of the foregoing reasons, Petitioner Brian O'Keefe respectfully requests that this Court grant him the relief requested herein.

Dated this 7th day of April, 2011.

/S/
Patricia A. Palm, Bar No. 6009
1212 S. Casino Center Blvd.
Las Vegas, Nevada, 89104
(702) 386-9113
Attorney for Brian O'Keefe

VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

PATRICIA PALM, being first duly sworn, deposes and says:

1. That she is an attorney duly licensed to practice law in the State of Nevada and is the attorney appointed to represent Mr. O'Keefe herein.

2. That Counsel has read the foregoing Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition, and Request for Stay of Trial, and knows the contents therein and as to those matters they are true and correct and as to those matters based on informed and belief she is informed and believes them to be true.

3. That Mr. O'Keefe has no other remedy at law available to him and that the only means to address this problem is through the instant writ.

4. That Counsel signs this Verification on behalf of Mr. O'Keefe, under his direction and authorization and further states that Mr. O'Keefe is currently in custody of the authorities of the Clark County Detention Center.

Further your Affiant sayeth naught.

Dated this 7th day of April, 2011.

PATRICIA A. PALM

SUBSCRIBED AND SWORN to before me
This 7th day of April, 2011, by Patricia Palm.

NOTARY PUBLIC
KRISTINE YACKIRA

Notary Public

31

12-1527

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petition, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record, to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: April 7, 2011.

/S/

PATRICIA PALM
NEVADA BAR NO. 6009
PALM LAW FIRM, LTD.
1212 S. CASINO CENTER BLVD.
LAS VEGAS NV 89104
(702) 386-9113
Attorney for Petitioner

12-15271

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of April, 2011, she personally delivered a copy of the foregoing Petition for Writ of Mandamus, or in the Alternative, a Writ of Prohibition and Appendices to The Honorable Michael P. Villani, RJC, 11th Floor, Department 17, 200 Lewis Ave., Las Vegas NV 89155, by leaving a copy at his chambers with Cindy DeGree, his Judicial Executive Assistant, who accepted the documents on his behalf.

It is understood that counsel for Respondent will be served via the e-filing system.

Dated this 7th day of April, 2011.

/S/
PATRICIA A. PALM
PALM LAW FIRM, LTD.

12-15271

IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

BRIAN KERRY O'KEEFE,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MICHAEL VILLANI, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

Supreme Court No. 58109
District Court Case No. C250630

RECEIPT FOR DOCUMENTS

TO: Hon. Michael Villani, District Judge
Palm Law Firm, Ltd./Patricia A. Palm
Attorney General/Carson City/Catherine Cortez Masto, Attorney General
Clark County District Attorney/Steven S. Owens, Chief Deputy District Attorney

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

4/8/11	Filing fee waived. Criminal.
4/8/11	Filed Petition for Writ of Mandamus, or, In the Alternative, Writ of Prohibition, and Request for Stay of Trial.
4/8/11	Filed Appendix to Petition for Writ Volumes 1 through 14.

DATE: April 08, 2011

Tracie Lindeman, Clerk of Court

12-15271

exhibit 22

Case No. C250630

Defense MOTION : SUICIDES, inter alia

FILED JUL 21 2010

exhibit 22

001
PALM LAW FIRM, LTD.
PATRICIA PALM, ESQ.
NEVADA BAR NO. 6009
1212 CASINO CENTER BLVD.
LAS VEGAS, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
Email: Patricia.palmlaw@gmail.com
Attorney for Brian O'Keefe

FILED
JUL 21 2010
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff,
vs.
BRIAN K. O'KEEFE,
Defendant.

CASE NO: C250630
DEPT. NO: XVII
DATE: Aug 3, 2010
TIME: 8:15 A

NOTICE OF MOTION AND MOTION BY DEFENDANT O'KEEFE TO ADMIT EVIDENCE PERTAINING TO THE ALLEGED VICTIM'S MENTAL HEALTH CONDITION AND HISTORY, INCLUDING PRIOR SUICIDE ATTEMPTS, ANGER OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-MUTILATION AND ERRATIC BEHAVIOR

COMES NOW Defendant Brian K. O'Keefe, by and through his attorney, Patricia Palm of Palm Law Firm, Ltd., and hereby moves this Honorable Court for an order allowing him to introduce evidence of the alleged victim's mental health condition and history, including prior suicide attempts, anger outbursts, anger management therapy, self-mutilation, and erratic behavior.

This Motion is made and based upon the record in this case, including the papers and pleadings on file herein, the Constitutions of the United States and the State of Nevada, the points and authorities set forth below, and any argument of counsel at the

///

time of the hearing on this Motion.

Dated this 21st day of July, 2010.

PALM LAW FIRM, LTD.

Patricia Palm, Bar No. 6009
1212 Casino Center Blvd.
Las Vegas, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
Attorney for Defendant O'Keefe

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **MOTION BY DEFENDANT O'KEEFE TO ADMIT EVIDENCE PERTAINING TO THE ALLEGED VICTIM'S MENTAL HEALTH CONDITION AND HISTORY, INCLUDING PRIOR SUICIDE ATTEMPTS, ANGER OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-MUTILATION AND ERRATIC BEHAVIOR** on the 3 day of Aug, 2010, at the hour of 8:15 a.m., in Department No. XVII of the above-entitled Court, or as soon thereafter as counsel may be heard.

DATED this 21st day of July, 2010.

PALM LAW FIRM, LTD.

By: PATRICIA PALM
Nevada Bar No. 6009
1212 Casino Center Blvd.
Las Vegas, NV 89104
(702) 386-9113
Attorney for Defendant O'Keefe

POINTS AND AUTHORITIES
PROCEDURAL HISTORY

The State charged Defendant Brian K. O'Keefe with murder with use of a deadly weapon. He entered a plea of not guilty and invoked his right to a speedy trial. The State filed a motion to admit evidence of other crimes, which O'Keefe opposed. The Court ruled that the State could introduce evidence of threats to the alleged victim Victoria Whitmarsh, which witness Cheryl Morris claims were made by O'Keefe, and his claim of proficiency at killing with knives, which Morris claims to have witnessed. The Court further ruled that the State could introduce certified copies of the prior Judgment of Conviction for felony domestic battery, which involved Whitmarsh. Further, if O'Keefe testified, then the State could inquire into his other prior felony convictions. Pursuant to the Court's ruling on his prior Judgments of Conviction, the State is permitted to introduce only the details of when O'Keefe was convicted, in which jurisdiction, and the name of the offenses, and with the felony domestic battery, the fact that Whitmarsh had testified against him in that case. 3/16/09 TT 2-10.

The instant case was tried before this Honorable Court beginning March 16, 2009. O'Keefe was prohibited from introducing evidence regarding Whitmarsh's mental health condition which caused her to be erratic, have uncontrolled anger, attempt suicide by overdosing and cutting herself with knives and scissors when stressed, and required anger management therapy. After five days of trial, on March 20, 2009, the jury returned a verdict finding O'Keefe guilty of second degree murder with use of a deadly weapon. On May 5, 2009, this Court sentenced O'Keefe to 10 to 25 years for second-degree murder and a consecutive 96 to 240 months (8 to 20 years) on the deadly weapon enhancement.

O'Keefe timely appealed to the Nevada Supreme Court. After briefing, the Court reversed O'Keefe's conviction, agreeing with him that the district court "erred by giving the State's proposed instruction on second-degree murder because it set forth an alternative theory of second-degree murder, the charging document did not allege this alternate theory, and no evidence supported this theory." The Court explained, "the

State's charging document did not allege that O'Keefe killed the victim while he was committing an unlawful act and the evidence presented at trial did not support this theory of second-degree murder." O'Keefe v. State, NSC Docket No. 53859, Order of Reversal and Remand (April 7, 2010). The Court further stated, "The district court's error in giving this instruction was not harmless because it is not clear beyond a reasonable doubt that a rational juror would have found O'Keefe guilty of second-degree murder absent the error." Id. at 2. Having reversed on this ground, the Court declined to address O'Keefe's remaining contentions, which included a contention that the district court erred by refusing O'Keefe's request to present evidence of Whitmarsh's prior suicide attempts, anger outbursts, anger management therapy, self-mutilation, and erratic behavior.

After remand to this Court, trial was reset to begin on August 23, 2010.

STATEMENT OF FACTS

The prior trial testimony in this case showed that Brian O'Keefe and Victoria Whitmarsh met in a treatment facility in 2001. 3/17/09 TT 18, 3/19/09 TT 183-84. They dated and co-habitated off and on and had what could be described as a very tumultuous relationship. 3/19/09 TT 186-90. In 2004, O'Keefe was convicted of burglary for entering into the couple's joint dwelling with the intent to commit a crime against Whitmarsh. O'Keefe was sentenced to probation, but his probation was revoked when he was convicted of a third offense of domestic battery against Whitmarsh, and he went to prison in 2006. 3/18/09 TT 139-40, 3/19/09 TT 187-88. Whitmarsh testified against O'Keefe in the domestic battery case. 3/18/09 TT 139.

When O'Keefe was released from prison in 2007, he met and began a relationship with Cheryl Morris. 3/17/09 TT 10, 3/19/09 TT 189. He would often speak to Morris about his previous relationship with Whitmarsh, and even expressed to her that he still had strong feelings for Whitmarsh. 3/17/09 TT 13-14, 37. Morris claimed at trial that O'Keefe said he was upset with Whitmarsh because she put him in prison and he said he wanted to "kill the bitch." 3/17/09 TT 14-17. Morris testified that O'Keefe left at one point to be with Whitmarsh, and then telephoned Morris, asking her to move out

of their jointly shared apartment so Whitmarsh could move in. 3/17/09 TT 11. Morris testified that Whitmarsh got on the phone with her during that call and told her she had decided to resume her relationship with O'Keefe. The two of them appeared to be a loving couple and were open about their relationship. 3/16/09 TT 259, 3/19/09 TT 18-21, 30-36.

At about 10:00 p.m. on the evening of the incident, in November 2008, a neighbor who lived in the apartment below O'Keefe and Whitmarsh heard what she described as thumping and crying noises coming from upstairs. 3/16/09 TT 185-88. The noise became so loud that it woke her husband, Charles Toliver, who was in bed next to her. Id. at 186-200. Toliver went upstairs to inquire about the noise and found the door to O'Keefe's apartment open. Id. at 206-209. He yelled inside to get the occupants' attention, at which time O'Keefe came out of the bedroom and shouted at Toliver to "come get her!" Id. at 209-10. When Toliver entered the bedroom, he saw Whitmarsh lying on the floor next to the bed and saw blood on the bed covers. Id. at 210. O'Keefe was holding her and saying "baby, baby, wake up, don't do me like this." Id. at 210, 224. O'Keefe did not stop Toliver from going in the apartment or otherwise fight with him. Id. at 224. Toliver left the apartment immediately and shouted at a neighbor who was outside to call the police. Id. at 213. He also brought Todd Armbruster, another neighbor, back upstairs. Id. at 214. O'Keefe was still holding Whitmarsh and told Armbruster to get the hell out of there. Id. at 215. Armbruster called 911. Id. at 238. He thought that O'Keefe was drunk. Id. at 240, 245.

By this time, shortly after 11:00 p.m., police had arrived on the scene. 3/16/09 TT 215, 3/17/09 TT 65. When they entered the bedroom, they found Whitmarsh lying on the floor next to the bed and an unarmed O'Keefe cradling her in his arms and stroking her head. 3/17/09 at 87, 98. The police believed Whitmarsh to be dead and ordered O'Keefe to let go of her, but he refused. Id. at 51-52, 60-61, 87. The officers eventually subdued him with a taser gun and carried him out of the bedroom. Id. 88. O'Keefe was acting agitated, id. at 73, the officers testified that he had a strong odor of alcohol on him, and he appeared to be extremely intoxicated. Id. at 127-28, 3/18/09 TT

170-76. Much of his speech was incoherent, but at one point he said that Whitmarsh stabbed herself and he also said that she tried to stab him. 3/17/09 TT 58, 85, 92. They arrested him and brought him to the homicide offices. 3/17/09 TT 177. Subsequent to his arrest, O'Keefe gave a rambling statement indicating he was not aware of Whitmarsh's death or its cause. 3/18/09 TT 133. Police interviewed him at 1:20 a.m., at which time he was crying, raising his voice, talking to himself, and slurring. Detective Wildemann stated that during the interview O'Keefe smelled heavily of alcohol, and when police took photographs of him at about 3:55 a.m., they had to hold him upright to steady him. 3/18/09 TT 146-49. Wildemann said it was pretty obvious that O'Keefe had been drinking, however, law enforcement did not obtain a test for his breath or blood alcohol level either before or after the interview. Id.

Whitmarsh had also been drinking on the date of the incident, and at the time of her death, her blood alcohol content was 0.24. 3/18/09 TT 94, 117. She died of one stab wound to her side and had bruising on the back of her head. Id. at 93, 103. Medical Examiner Dr. Benjamin testified that Whitmarsh's toxicology screen indicated that she was taking Effexor and that drug should not be taken with alcohol. Id. at 109. Whitmarsh had about three times the target dosage of Effexor in her system. 3/19/09 TT 94-98. The combination of Effexor and alcohol could have caused anxiety, confusion and anger. 3/19/09 TT 95-96. Whitmarsh also had Hepatitis C and advanced Cirrhosis of the liver, which is known to cause bruising with only slight pressure to the body. 3/18/09 TT 93-97. Whitmarsh's body displayed multiple bruises at the time Dr. Benjamin examined her and the bruises were different colors, but she could not say that they were associated with Whitmarsh's death or otherwise say how long ago Whitmarsh sustained the bruises. 3/18/09 TT 115. DNA belonging to O'Keefe and to Whitmarsh was found on a knife at the scene. 3/18/09 TT 62-67.

O'Keefe testified. 3/19/09 TT 177. He acknowledged his problems with alcohol and described his history with Whitmarsh. Id. at 177-93. He disputed Morris's claim that he said he wanted to kill Whitmarsh, but he acknowledged being angry with her. Id. at 190. It was Whitmarsh who called O'Keefe and initiated their renewed relationship.

Id. at 191. He was aware that Whitmarsh had Hepatitis C when she moved into his apartment. Id. at 197-98. In November, 2008, Whitmarsh was stressed because of her financial condition. 3/20/09 TT 17. A couple of days before the incident at issue here, Whitmarsh confronted O'Keefe with a knife. Id. at 18-19. She had been drinking and was on medication. Id. O'Keefe had not been drinking that night and was able to diffuse the situation. Id. at 19. On November 5, 2009, O'Keefe learned that he would be hired for a new job and had two glasses of wine to celebrate. Id. at 21-24. O'Keefe and Whitmarsh went to the Paris Casino where they both had drinks. Id. at 24-25. They returned home, and she was upset and went upstairs while he reclined in the passenger seat of the car for a period of time. Id. at 26-28. He went upstairs and then smoked outside on a balcony while she was in the bathroom. Id. at 29-30. He then went in the bedroom and saw Whitmarsh coming at him with a knife. Id. at 33. He swung his jacket at her and told her to get back. Id. He knew that she was mad at him about a lot of things. Id. He grabbed the knife, she yanked it and cut his hand. Id. at 33. They struggled for a period of time. Id. at 33-36. During the struggle, she held the knife and fell down, he fell on top of her and then he realized that she was bleeding. Id. at 35-37. He was still drunk at this point and was trying to figure out what happened. Id. at 37. He tried to stop the bleeding and panicked. Id. at 38. He tried taking care of Whitmarsh and asked his neighbor to call someone after the neighbor came into his room. Id. at 40. He became agitated when the neighbor brought another neighbor up to look at Whitmarsh, who was partially undressed, rather than calling the paramedics. Id. at 41. O'Keefe denied hitting or slamming Whitmarsh. Id. at 42. He testified that he did not intentionally kill Whitmarsh, but felt responsible because he drank that night and he should not have done so. Id. at 49.

During trial, the State objected to the admission of any testimony concerning Whitmarsh's suicide attempts and to admission of documents concerning Whitmarsh's medical history. 3/19/09 TT 61. O'Keefe's counsel submitted points and authorities as to the admissibility of evidence showing that Whitmarsh had a history of suicide attempts by overdose and cutting herself, depression, panic disorder, anger outbursts,

and incidents with self-mutilation by cutting. See Defense Proposed Exhibit B (on file with this Court); 2 ROA 265. The Court found that Whitmarsh's attempted suicides were not acts of violence and found that the testimony and evidence from the medical records were not admissible. 3/20/09 TT 7-8. The Court also prohibited admission of evidence concerning her anger management classes. Id.

ARGUMENT

O'Keefe has a fundamental federal and state constitutional right to present evidence in his defense pertaining to the alleged victim Whitmarsh's mental health condition and history and its manifestations through conduct, including her pattern of suicidal behavior and anger control problems, in support of his claims regarding the sequence of events and his innocent actions during the incident leading to Whitmarsh's death.

O'Keefe renews his request to present evidence in his defense, by way of expert testimony summarizing Whitmarsh's mental health history and condition and its manifestations through conduct, by admission of portions from medical records documenting the same,[1] and by way of his own testimony regarding his knowledge of Whitmarsh's mental health condition and its manifestations.

Having been Whitmarsh's partner on and off since 2001, O'Keefe was well aware at the time of the incident of her mental health history, which included multiple suicide attempts, both by overdose and cutting herself with knives or scissors, was aware that she self-mutilated, was aware that she had uncontrollable anger outbursts and problems when stressed over relationship issues and when abusing drugs or alcohol, and that she was attending anger management counseling..

This evidence supports O'Keefe's testimony regarding the events leading up to Whitmarsh's death and his innocent response to her aggression, and as such it is relevant and highly probative on the issues of whether Whitmarsh was alone in the

[1]The State has previously stipulated to the authenticity of these records, which are on file with the Court as Defendant's Proposed Exhibit B from the prior trial.

apartment and having a fit of anger when the neighbors heard banging noises (as O'Keefe contends that she must have been and which would explain the lack of fresh bruising as would be consistent with the State's prolonged-abuse theory of the case); whether she had taken the kitchen knife into the bathroom of the master bedroom when she was alone in the apartment (as O'Keefe contends she may have been preparing to harm him, self-mutilate, or commit suicide by overdose and cutting, which is consistent with the facts that she had three times her prescription dose of Effexor in her system and had an apparent injury on her hand); whether she was holding the knife when O'Keefe entered the bedroom (O'Keefe contends that she was holding the knife and surprised him); and whether she charged at O'Keefe in anger (as she has a documented history of anger control problems, which may have been exacerbated by the mixture of Effexor and alcohol in her system).

The evidence related to Whitmarsh's mental health history is also corroborative evidence of O'Keefe's state of mind and whether he believed Whitmarsh was going to harm him when she came at him with the knife – he knew she was unstable and dangerous when upset, especially when under the influence of alcohol and drugs.

The medical records from which O'Keefe seeks to admit excerpts and upon which his expert will rely show as follows:

October 2001 Admission to Montevista Hospital (when Whitmarsh and Brian met)

> Whitmarsh was admitted October 31, 2001 ***after she cut both wrists with a knife in what she reported was her fourth suicide attempt.*** She was on the medications Celexa, Xanax and Vistaril. She was diagnosed with Major Depressive Episode, Panic Disorder with Agoraphobia.

May 2002 Admission to Montevista Hospital

> Whitmarsh was admitted on May 21, 2002 because she'd been using Xanax, Lortab, Oxycotin; she was blacking out and unable to function at work; withdrawal was severe; consequences of use included severe dysfunction in her relationship with husband from whom she is separated; psychiatric history was reported as follows: *"She has severe anxiety and depression; she was suicidal and hospitalized at Montevista Hospital in October of 2001 for an overdose and cutting her wrist. She also*

overdosed in 1983 and was hospitalized." Her diagnosis was opiate dependence, continuous, xanax dependence continuous, major depression, recurrent.

September 2006 Admission Montevista Hospital (this admission was during Brian's incarceration)

Whitmarsh was admitted September 26, 2006. She was diagnosed as Bipolar, Dep; Polysub dep; liver cirrhosis w/ascites; Hep C; underweight; gerd; social; marital. The Report of Dr. Allgower states *"took lethal dose of Xanax requiring intubation/mechanical ventilation h/o depression, also has self-inflicted wrist lac." Form by Dr. Slagle states: "Ms Whitmarsh has made at least 3 suicide attempts. Recent attempt could have been fatal."* Report by Dr. Ajayi states that Whitmarsh's suicide attempt resulted in admission to ICU. She had been transferred from St. Rose where she had been in ICU from 9/24/06 – 9/26/06, ***she overdosed on Xanax and friend's morphine after an argument with her estranged husband.*** Diagnosis at St. Rose was Bipolar Disorder type II, depressed vs recurrent major depression and borderline personality traits. *She reported 2 previous suicide attempts (1983 OD on pain meds after fight with husband) and (OD on pills and cutting wrists in 2001). "She has been self-mutilating for the pasts 15 years and stated that she cuts herself when she is angry and the last time she cut her left wrist was with a pair of scissors on September 22, 2006. She complained of irritability, mood swings, difficulty sleeping at night because of racing thoughts, poor appetite, anxiety, . . . She also reports episodic euphoria, anger outbursts and decreased need for sleep. She reports ongoing conflict with her estranged husband and her sister and her 21 year old daughter." Dr. Slagle documented poor impulse control, and that her 2001 admission to Montevista was because "she was angry, screaming and "went berserk" after an argument with her husband and overdosed on pills and cut her wrist."* Drug and alcohol abuse history: She has a history of abusing Xanax back to at least 2001; history of dependence on Lortab, Percocet, and Oxycotin dating back to 2002. Inpatient Detox at Montevista in May 2002 followed by inpatient rehab through June 2002. Most recently admitted for detox from Percocet and Lortab at Valley Hospital in August 2006. Her diagnosis was: biopolar disorder, type II, depressed, benzodiazepine dependence, opiate dependence, hx of alcohol dependence in sustained full remission; borderline personality traits.... Hep C, Liver Cirrhosis.... *Her treatment plan included anger management.*

She had racing thoughts and substantial mood swings since 2000; 2 prior suicide attempts in the 1980s both since she married her husband; history of high moods and anger problems; past history of very heavy alcohol use. Hx of pain medication abuse.

*Chart notes further show that Whitmarsh "admits to a history of self-mutilation. Most recently, she **stabbed herself on her hands**, August 22, 2006, "because I am not happy [with] myself."*

*And "pt denies wanting to kill self, but does state when angry she will self-mutilate and take pills to cope [with] emotional pain. **Admits to "taking the pills because I was mad [with] my husband."***

Southern Nevada Adult Mental Health October 2007 Admission (This admission was after Brian's release from incarceration but while the couple was separated)

Whitmarsh took an overdose of pills in an apparent suicide attempt.

(Emphasis added).

Whitmarsh's records demonstrate a pattern of self-mutilation by cutting and suicide attempts by overdosing and cutting during angry or berserk reactions to fights with her husband and when she was not even in a relationship with O'Keefe. The evidence supports O'Keefe's explanation for why it was Whitmarsh, and not he, who brought the knife into the bedroom. However, a jury deprived of this evidence, and knowing of O'Keefe's prior felony domestic battery conviction involving Whitmarsh, is likely to unfairly assume that O'Keefe retrieved the knife from the kitchen to harm Whitmarsh or that if Whitmarsh did bring the knife into the bedroom, she was doing so to protect herself.

O'Keefe must be allowed to present this crucial evidence, as it corroborates his claim of self-defense/accident, i.e., that Whitmarsh was out of control and he was defending himself, and during the struggle for the knife, the accident occurred leading to Whitmarsh's death. This Court has already ruled, pursuant to the State's bad acts motion, that the State may introduce evidence that O'Keefe was convicted of felony domestic battery involving Whitmarsh as relevant to his motive and intent.

The State also presented evidence at the previous trial to show that Whitmarsh was "very meek" and submissive. 3/17/09 TT 15, 40. The State was also quick to point out during the previous trial that Whitmarsh had a wound on her hand, when a defense

expert opined that she had no defensive wounds. 3/19/09 TT 156. O'Keefe must be allowed to rebut that evidence with evidence that Whitmarsh had a history of cutting herself and suffered from uncontrollable anger and suicidal tendencies.

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as the Nevada Constitution, article 1, section 8, protect a criminal defendant's right to a fair trial, at which he may confront and cross-examine witnesses and present evidence in his defense. Preclusion of this evidence violates O'Keefe's rights. Pointer v. Texas, 380 U.S. 400 (1965) (recognizing that the right of confrontation requires that a criminal defendant be given an opportunity to cross-examine the witnesses against him); Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (stating that "the rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process").

It is unclear in Nevada whether evidence of an alleged victim's prior mental health history including suicide attempts and anger control issues comes under the test for character evidence or whether it is simply subject to a probative-value-versus-unfair-prejudice test.

Other states' courts considering the admissibility of evidence pertaining to alleged victims' mental health conditions have determined that the evidence is not restricted by the rules pertaining to character evidence. Instead, the evidence is deemed to be admissible so long as relevant to a material issue. See State v. Stanley, 37 P.3d 85, 90 (N.M. 2001) (collecting cases and noting that a clear majority of courts hold that evidence of suicide attempts by a victim in a homicide case is admissible to show the victim's state of mind); People v. Salcido, 246 Cal.App.2d 450, 458-60 (Cal.App. 5th Dist. 1966) (same); State v. Jaeger, 973 P.2d 404, 407-08 (Utah 1999) (medical records, containing statements that the victim had previously attempted suicide, were admissible when introduced in a case where defendant claimed the victim committed suicide).

In Stanley, The New Mexico Supreme Court concluded that it is not appropriate to consider such evidence as "character evidence" subject to the rule preventing

evidence of a person's character or a trait of character from being admitted for the purpose of proving conformity. That court reasoned that the evidence is related to mental illness and its specific manifestations and not character. 37 P.3d at 375. Further, since the main purpose of the evidence rules is to search for the truth, a finding of relevancy and the careful application of the probative-value-versus-unfair-prejudice balancing test is sufficient to prevent the misuse of this evidence. Id. at 375-76. Where a deceased person has a pattern of suicidal or violent behavior prior to the incident leading to his death, that evidence is relevant to the alleged victim's state of mind and causation in a murder trial. 37 P.3d at 372-73. In Stanley, the court concluded that the alleged victim's pattern of suicide attempts and violent or suicidal behavior dating back to 1987, i.e., 11 years prior to the death in question, should have been admitted at trial. Id. at 374. The court determined that evidence that a deceased person suffered from mental illness and had attempted suicide in the past "is not the type of evidence that has the unusual propensity to prejudice, confuse, inflame or mislead the fact finder." Id. Finally, the court recognized that a defendant has a "fundamental right to present evidence negating the State's evidence on causation and the fact finder should [be] given the opportunity to consider such evidence and determine what weight, if any, to give to it in light of the other evidence." Id. at 374.

Similarly, in Salcido, the California Court of Appeals determined that hospital records showing the victim of an alleged murder had been treated for a suicide attempt are relevant to whether death was brought about by criminal agency. 246 Cal.App.2d at 458. The court stated that "in a murder case it is the victim's inclination or propensity to commit suicide under emotional stress that is relevant and any competent evidence which logically and reasonably tends to show this is admissible unless objectionable under some other rule of exclusion." Id. at 459-60. The Court further recognized that even a remote suicide attempt, when considered in light of several similar attempts, has evidentiary value. Id.

NRS 48.015 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action

more or less probable than it would be without the evidence." Pursuant to that statute, relevant evidence is admissible, however, it may be excluded its probative value is *substantially outweighed* by the danger of unfair prejudice, of confusion of the issues, of misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. NRS 48.035. Here the evidence sought to be introduced is relevant on all of the issues set forth above, i.e., Whitmarsh's state of mind, O'Keefe's state of mind, whether there is an innocent explanation for the banging noises the neighbors heard, whether O'Keefe's claim that Whitmarsh had the knife is likely to be true, and whether O'Keefe's claim that Whitmarsh was in an uncontrolled fit of anger so that he was defending himself from her when an accident caused her death is likely to be true. Indeed, the probative value here is even greater because the jury will be aware of O'Keefe's prior conviction for felony domestic battery and will likely tend to disbelieve his claim that Whitmarsh brought the knife into the bedroom and was the aggressor. There is no unfair prejudice to the State by allowing the jury to hear this evidence and determine for itself the weight to give it.

On the other hand, even if the evidence in question constitutes "character evidence," it is admissible as it tends to show that Whitmarsh was the likely aggressor in the conflict leading to her death.

NRS 48.045(1)(b) provides that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: . . . [e]vidence of the character or a trait of character of the victim of the crime offered by an accused . . . and similar evidence offered by the prosecution to rebut such evidence." Additionally, NRS 48.055(1) states, "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination, inquiry may be made into specific instances of conduct."

The Nevada Supreme Court has interpreted these statutes to require that an accused, who claims he acted in self-defense, be permitted to present evidence of the

character of an alleged victim *regardless of the accused's knowledge of the victim's character* when it tends to prove the victim was the likely aggressor. Petty v. State, 116 Nev. 321, 326-27, 997 P.2d 800, 802-03 (2000). Proof may be established by testimony as to reputation or in the form of an opinion. Id. *An opinion as to violent character may even be based on knowledge of only one incident of violence.* For instance, in Petty, the Court held that the district court erred by excluding testimony from a probation officer and police officer regarding their opinions as to the violent character of the victim, even though the police officer's opinion was based upon only one violent incident. Id. Based upon the foregoing authorities, Brian O'Keefe is entitled to present evidence in the form of his is opinion or reputation testimony as to Whitmarsh's erratic character and problems with anger control which caused her to act irrationally and dangerously and to overdose and cut herself with knives and scissors.

Furthermore, at the time of the incident in question, Brian O'Keefe was aware of Whitmarsh's aggressive and erratic character and uncontrollable anger wherein she turned to pills and cutting instruments. The Nevada Supreme Court has held that if the accused, who is claiming he acted in self-defense, is aware of specific acts of violence by an alleged victim, then evidence as to those specific acts is admissible to show the accused's state of mind at the time of the allege crime. Id. at 326-27, 997 P.2d at 803; see also Burgeon v. State, 102 Nev. 43, 45-46, 714 P.2d 576, 578 (1986); Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991). In Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003), the Nevada Supreme Court explained as follows:

> [A] defendant should be allowed to produce supporting evidence to prove the particular acts of which the accused claims knowledge, thereby proving the reasonableness of the accused's knowledge and apprehension of the victim and the credibility of his assertions about his state of mind. . . . The self-serving nature of an accused's testimony about prior violent acts of the victim makes corroborating evidence of those acts particularly important for an accused's claim of self-defense.

Id. at 518, 78 P.3d at 32 (citing State v. Daniels, 465 N.W.2d 633, 636 (Wis. 1991)).

The admission of evidence of a victim's specific violent acts, *regardless of its source*, is within the sound and reasonable discretion of the trial court and is limited to

the purpose of establishing what the defendant believed about the character of the victim. Daniel, 119 Nev. at 516, 78 P.3d at 32. In sum, not only may a defendant present evidence regarding specific acts by victims where the accused is aware of such acts, *but the defendant may also present corroborating evidence to prove the particular acts of which the accused claims knowledge. "[W]hen a defendant claims self-defense and knew of relevant specific acts by a victim, evidence of the acts can be presented through the defendant's own testimony, through cross-examination of a surviving victim, and through extrinsic proof."* Id. at 516, 78 P.3d at 32-33. Therefore, because Brian O'Keefe was aware of Whitmarsh's prior acts of violence, including violence to herself by cutting/overdosing, and her anger control problems, he is entitled to present not only his own testimony but any additional corroborating evidence to establish those prior acts.

Additionally, to the extent that the State may again seek to admit evidence of Whitmarsh's character of peacefulness, as it did during the previous trial by introducing evidence that Whitmarsh was meek and submissive, O'Keefe has a right to confront and cross-examine the State's witnesses as to their knowledge of Whitmarsh's angry fits wherein she screamed, went berserk, lost control, overdosed, and used cutting instruments to do violence upon herself. See State v. Sella, 41 Nev. 113, 168 P. 278 (1917); U.S. Const. Amend VI; Nev. Const. art. 1, sec. 8. Indeed, NRS 48.055(1) specifically provides that when proof by testimony as to reputation or in the form of an opinion has been given, "on cross-examination, inquiry may be made into specific instances of conduct."

CONCLUSION

Based on the foregoing, Brian O'Keefe moves this Court for a ruling permitting him to present expert testimony summarizing Whitmarsh's mental health history and condition and its manifestations, evidence from the medical record documentation discussed herein, and his own testimony showing that she had a pattern of prior suicide attempts through overdose of pills and cutting, and a history of anger outbursts, anger

management therapy, self-mutilation, and erratic behavior. All of this evidence corroborates and supports his claim that he reasonably believed Whitmarsh's state of mind was such that she attempting to cause him serious injury at the time of the incident, his claim that she was the aggressor, and his explanation of the circumstances leading to Whitmarsh's accidental death.

DATED this 21st day of July, 2010.

PALM LAW FIRM, LTD.

Patricia Palm, Bar No. 6009
1212 Casino Center Blvd.
Las Vegas, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
Attorney for Defendant O'Keefe

exhibit 23

CORRECT CASE NO. C250630

SHOWS WRONG - CASE NO. C250360 ?

FILED JUN 15, 2012

INSTRUCTION NO.'s 1, 2, 3, 4, 5, 6, 7, 18

BARRED INSTRUCTIONS - (GENERAL INTENT INSTRUCTION # 18)

exhibit 23

ORIGINAL

INST

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
JUN 15 2012
BY, CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
BRIAN KERRY O'KEEFE
Defendant.

CASE NO: C250360
DEPT NO: XVII

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt. In this case, it is charged in an Amended Information that the Defendant committed Murder of the Second Degree on or about the 5th day of November, 2008, did then and there wilfully, feloniously, without authority of law, and with malice aforethought, kill VICTORIA WHITMARSH, a human being, by stabbing at and into the body of the said VICTORIA WHITMARSH, with a deadly weapon, to-wit: a knife.

INSTRUCTION NO. 4

Murder of the second degree is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

INSTRUCTION NO. 5

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed. It may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief, or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes an unlawful purpose and design as opposed to accident and mischance.

INSTRUCTION NO. 6

Express malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

INSTRUCTION NO. 7

The prosecution is not required to present direct evidence of a defendant's state of mind as it existed during the commission of a crime. The jury may infer the existence of a particular state of mind of a party or a witness from the circumstances disclosed by the evidence.

INSTRUCTION NO. 18

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

exhibit 24

Correct CASE No. C250630

C250360 wrong #

VERDICT 3RD TRIAL

FILED JUNE 15, 2012 1:50 pm.

exhibit 24

ORIGINAL

VER

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
JUN 15 2012 at 1:51 P.M.
BY Carol Donahoo
CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
BRIAN KERRY O'KEEFE,
Defendant.

CASE NO: C250360
DEPT NO: XVII

C250360
VER
Verdict
1878223

VERDICT

We, the jury in the above-entitled case, find the Defendant, BRIAN KERRY O'KEEFE, as follows:

(please check the appropriate box, selecting only one)

☑ Guilty of Murder of the Second Degree With Use of a Deadly Weapon

☐ Guilty of Murder of the Second Degree Without Use of a Deadly Weapon

☐ Not Guilty

DATED this 15 day of June, 2012

FOREPERSON

005335

exhibit 25

CASE No. CZ50630

PRO SE MOTION TO DISMISS

Collateral Estoppel - Res Judicata

FILED: MARCH 16, 2012

HEARD: MARCH 29, 2012

exhibit 25

PRO SE

BRIAN KERRY O'KEEFE
#3417732

CLARK COUNTY DETENTION CENTER
330 S. CASINO CENTER BLVD.
LAS VEGAS NEVADA 89101

FILED
MAR 16 12 04 PM '12
CLERK OF THE COURT

IN THE
EIGHTH JUDICIAL
DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
plaintiff,
vs.
BRIAN KERRY O'KEEFE,
defendant.

CASE NO: C250630
DEPT. NO: XVII
DATE OF HEARING: 3-29-12
TIME OF HEARING: 8:15 a

● SEE APPENDIX (12) EXHIBITS

NOTICE OF MOTION AND

MOTION TO DISMISS BASED UPON VIOLATION(S) OF THE FIFTH AMENDMENT COMPONENT OF THE DOUBLE JEOPARDY CLAUSE, CONSTITUTIONAL COLLATERAL ESTOPPEL AND, ALTERNATIVELY, CLAIMING RES JUDICATA, ENFORCEABLE BY THE FOURTEENTH AMENDMENT UPON THE STATES PRECLUDING STATE'S THEORY OF PROSECUTION BY UNLAWFUL INTENTIONAL STABBING WITH KNIFE, THE ALLEGED BATTERY NOT DESCRIBED IN THE AMENDED INFORMATION.

COMES NOW the defendant BRIAN KERRY O'KEEFE, who hereby moves this HONORABLE court for an ORDER of dismissal with prejudice on the grounds that the 5th Amendment violations have already occurred and commencement of a third trial will further violate the Doctrine of the Law of the case of the First appeal with Constitutional collateral estoppel "barring" prosecutions theory of unlawful intentional stabbing with knife. The Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment due process with equal protection. The State now lacks theory, and evidence to SUPPORT the AMENDED INFORMATION charging Second Degree malice murder, conclusively.

IN accordance with HAINES v. KERNER, 404 U.S. 519, 92 S.Ct. 594, defendant humbly requests liberal reading be afforded and less stringent standards be applied to defendant's MOTION TO DISMISS.

This MOTION is made and based upon the Following Points and Authorities, all papers and documents on file in the record, Appendices of exhibits attached, and any argument as will be had at the time of hearing.

Dated this 14th day of MARCH, 2012

Brian O'Keefe
BRIAN O'KEEFE
C.C.D.C. - #1147732
IN PRO SE

MOTION with
APPENDIX of EXHIBITS
(1 - 18) EXHIBITS - (one pc)

NOTICE OF MOTION

TO: STATE of Nevada, Plaintiff, and
TO: STEVE Wolfson, District Attorney, Attorney For Plaintiff

You will please take NOTICE that the undersigned will bring on the above and attached MOTION on the 29 day of March, 2012, at the hour of 8:15 a.m., in Department XVII of the above entitled court, or as soon thereafter as defendant may be heard.

DATED this 14th day of MARCH 2012.

Brian O'Keefe
BY: BRIAN O'KEEFE
C.C.D.C. - #1147732
PRO SE

I. PROCEDURAL HISTORY II. PREDOMINATE OVERVIEW III. DOUBLE JEOPARDY Collateral Estoppel OPERATIVE FACTS, 5th Violations

IV. AUTHORITIES - ARGUMENT V. CONCLUSION a b c d

I. PROCEDURAL HISTORY

The state wrongfully charged Defendant Brian Keith O'KEEFE with murder with use of a deadly weapon for the alleged November 5, 2008 Killing of Victoria Whitnacal. On January 20, 2009 he entered a plea of not guilty and invoked his constitutional and statutory rights to a speedy trial. • On February 2, 2009, State files Motion to admit evidence of other crimes, hearing set February 10, 2009. On February 10, 2009, state files in OPEN COURT their Amended Information also. (Prior to the hearing) At the conclusion, Court sets a petrocelli hearing. This hearing is continued several times finally being conducted immediately preceding trial held MARCH 16, 2009. The Court ruled State could enter O'Keefe's FELONY battery domestic Violence case, C207835, in their case in chief through their WITNESSES.

The case was tried ending after Five days. On March 20, 2009 the jury found O'Keefe guilty of Second Degree murder with the use of a deadly weapon.

• On APRIL 7, 2009, defense Motion to settle the record was heard concerning INSTRUCTION No. 18 on defining and proving Second Degree MURDER. The Court and State make as a matter of the record, the definition is statutorily correct.

EMPHASIS also made on the judicial admission made by State and Court that jury and all believed O'Keefe was to intoxicated to form, "INTENT," therefore acquitting O'Keefe of INTENTIONALLY STABBING WITH KNIFE.

• On MAY 5, 2009 this Court sentences O'Keefe to 10-25 years for second and 8-20 years for the weapon enhancement. O'Keefe timely appeals. The Court reversed O'Keefe's conviction "DECIDING" ISSUE #2 on direct appeal.

The Nevada Supreme Court explained, (ORDER OF REVERSAL AND REMAND)

"the State's charging document did not allege that O'Keefe killed the victim while he was committing an UNLAWFUL ACT and the evidence presented at trial did not support this theory of Second Degree Murder."

• see O'KEEFE v. STATE N.S.C. DOCKET NO. 53859 (APR 7, 2010)

On June 10, 2010, remand, Scheduled retrial for AUGUST 23, 2010. On August 19, 2010, State Files a second amended information in OPEN COURT, C250630.

The state's prosecution theory again is unlawful intentional stabbing with knife. Second trial commences with State rehashing exact same evidence used in First trial. Trial ending with a hung jury. Court declares mistrial on September 2, 2010. Defendant now truely indigent. Case status checked until September 16, 2010 for defense attorney to be appointed after approval. Same counsel appointed September 16, 2010 preserving defendant's speedy trial rights. Third trial calendar call set for January 18, 2011, trial set January 24, 2011.

Now, CONTRARY to the Doctrine of the Law of the case, particularly issue preclusion, and the trial court's late prior ruling on August 23, 2010, being that the State was barred from discussing battered women's syndrome, the State ignores and files a supplemental notice of expert witnesses for the calling of Andrea Sundberg as an expert in BWS in it's case in chief.

Also, on January 6, 2011 the State filed a Motion in Limine to Admit Evidence of Other Bad Acts. HIGHLIGHTS ON STATE'S MOTION

a. STATE REHASHING SAME EVIDENCE BROUGHT IN EARLY PETRICELLI HEARING

b. ALL ACTS ARE MISDEMEANORS (Convictions - dismissed cases) N.R.S. 50.095?

c. MOTION IN LIMINE SCHEDULED FOR AFTER ORIGINAL CALENDAR CALL, LATE.

d. Violation of the LAW of the CASE, CONSTITUTIONAL COLLATERAL ESTOPPEL.

State's Motion was docketed for January 20, 2011. Ck was 1-18-2011.

● On January 7 2011, O'Keefe's attorney filed a Motion to Dismiss on Grounds of Double Jeopardy Bar, BASED ON WRONG OPERATIVE FACTS, a "PED HEARING", and Speedy Trial Violation and, Alternatively, to preclude State's new expert witness, evidence and argument relating to the dynamics of effects of domestic violence and abuse ● On January 14, 2011 State filed a supplemental notice of witnesses. At calendar call, January 18, 2011, the defense stated that it could not announce ready attributable to the State. This was based on state's actual Late Notice on hearing their Motion. Basically, this second bad acts hearing is the rehashing of the exact same crimes litigated 2 years prior on February 10, March 16, of 2009. However, the Court wanted to know if the defense was ready to proceed remembering that this is still January 18, 2011 and the State's Motion is scheduled for January 20, 2011. Ultimately, Court continues calendar call to January 20, 2011 for all untimely Motions. Court denies O'Keefe's Dbl. Jep. Motion but grants State a second petrocelli hearing and vacates O'Keefe's trial date. Third new trial date set June 6, 2011. Sets second petrocelli hearing, on same misdemeanors, for APRIL 7, 2011, then continued hearing to APRIL 12, 2011. Simultaneously on APRIL 8, 2011, O'Keefe's attorney files Writ in N.S.C., docket no. 58109. On APRIL 12, 2011 petrocelli hearing again continued to APRIL 27, 2011. With WRIT pending, the trial court finally conducts the second petrocelli hearing. At the conclusion of the hearing the court decides to set a two week status check for his final decision. May 11, 2011 set for ruling. ● On APRIL 29, 2011 O'Keefe's attorney files Motion to withdraw, set for MAY 12, 2011. Coincidentally, on MAY 10, 2011 the N.S.C. denies O'Keefe's WRIT, based on prosecutorial misconduct as the operative fact.

● On MAY 11, 2011, which was docketed for the judge's final ruling pertaining to the State's motion in LIMINE, Counsel for the defense advances her Motion to withdraw one day. Motion granted. Final ruling continued until September 23, 2011. Trial date vacated with new counsel being appointed. On July 21, 2011 new THIRD TRIAL date set. C/C June 5, 2012. TRIAL June 11, 2012.

● On September 23, 2011 ruling on misdemeanors continued several times ultimately to February 17, 2012. Defense Motion heard on November 8, 2011 by substitute Judge Breman. Order signed returning O'Keefe's sentencing fees that were deducted while O'Keefe was in prison before the REVERSAL. Mr. Lalli, for the state present, no objection. ● On December 16, 2011, defendant's Pro se motion granted. Defense counsel goes stand by mode. Parties reminded the Final hearing, ruling on misdemeanors set for February 17, 2012. O'Keefe orally requests to file his own opposition. Court Denies. On December 20, 2011, O'Keefe mails for pretrial federal habeas relief in the U.S. District Court.

U.S. District Judge NAVARRO responds admitting there are double jeopardy implications. Gives positive direction but dismisses O'Keefe's section 2241 without prejudice. O'Keefe appeals to the NINTH CIRCUIT COURT of APPEALS. CASE PENDING. Awaiting decision if CoA for single issue advanced, by AMENDED PETITION, will be issued.

NOTE: On February 17, 2012, State's Motion in Limine filed (13) months prior is finally completed. Judge temporarily defers decision but on MARCH 13 2012, enters judgment allowing the same felony C207835.

Defendant Files Motion why CoA should be granted MARCH 6, 2012 with the NINTH CIRCUIT. O'Keefe notifies all parties. In addition, O'KEEFE directly attacks the trial court with this Motion, on the Collateral Estoppel claims and prior Law of the Case of the First appeal. Res Judicata. [MOTION for CoA request mailed to Judge. (COPY of Motion mailed to 9th)]

II. PREDOMINATE OVERVIEW

Defendant contends this argument holds extreme MERIT. After the first trial, anyone applying honest, intelligent and logical thought concerning the following facts, would realize the first trial rulings and decisions, made by the Court, ultimately effected the jury returning a guilty verdict of second degree malice murder w.D.w..

Pointing out several rulings were so questionable that anybody reviewing would have severe questions as to the WHY? These rulings definitely became Violations of ones due process to a "complete defense".

The denial alone of allowing "no evidence" on Whitmarsh's mental health, suicides, cutting and self mutilations, anger management classes and therapy was more than questionable. THE FIRST JURY HEARD NOTHING RETURNING A MUCH (HIGHER) VERDICT. The denial of the defense motion to supress O'Keefe's Voluntary ramblin, when the police even admit O'Keefe was acting like a NUT, INCOHERENT, and extremely INTOXICATED.

The denial of precluding the State to start at first degree murder based on the State destroying O'Keefe's blood-breath ofawel.

Police committing PERJURY concerning the existence of the use of force form on a "specific discovery" request.

The State Unnecessarily bringing in Racial slurs. Not taking photo's of all cut fingers O'Keefe had.

The scales were tipped heavily. It only makes manifest the backing of ROGUE cops who decided this case by O'Keefe's criminal scope unaware that Whitmarsh was BI-POLAR, depressed, and in a overmedicated drunken rage in an extreme FIT of ANGER. (GOD BLESS HER SOUL!)

III. DOUBLE JEOPARDY COLLATERAL ESTOPPEL OPERATIVE FACTS, 5th VIOLATIONS

a. - PROSECUTIONS THEORY - UNLAWFUL INTENTIONAL STABBING WITH KNIFE

b. - ISSUE, #2 - DECIDED ON DIRECT APPEAL IN FAVOR OF DEFENDANT

c. - TWO UNTRUTHS - STATES WITNESSES; CHERYL MORRIS and DETECTIVE WILDEMANN

d. - Rehashing Evidence - State held two Petrocelli hearings on misdemeanors

OPENING STATEMENT **FIRST TRIAL** (INFORMATIONS) CLOSING ARGUMENT

a. On November 5, 2008, O'Keefe is wrongfully charged with Battery/Domestic Violence and murder with a deadly weapon. (see BATTERY DOMESTIC VIOLENCE, MURDER COMPLAINTS EXHIBIT 1)
On December 19, 2008 State electronically Filed information. (INFORMATION - C250630 EXHIBIT 2)
On February 10, 2009 state Files Amended Information, Open Court. (AMENDED INFORMATION EXHIBIT 3)

The state now makes manifest their theory of prosecution. The alleged battery act has been merged into the Amended Information. The same single alleged act is now described in the Amended Information as the "UNLAWFUL INTENTIONAL STABBING WITH KNIFE"

- On Monday, MARCH 16, 2009, opening statement by STATE declaring their THEORY.
(Monday, March 16, 2009 ROUGH DRAFT TRANSCRIPT JURY TRIAL DAY 1 EXHIBIT 4)

- FOR STATE LEAD, MR. SMITH OPENING STATEMENT TRIAL # 1

... the evidence is going to show you that the defendant, in Fact, stabbed Victoria ...
... we have to prove the death of Mrs. Whitmarsh was UNLAWFUL ...
... we are going to prove that the death in this case was nothing less than an INTENTIONAL ACT committed by the defendant against Mrs. Whitmarsh ...
... the defendant had a motive and underlying ill will towards Mrs whitmarsh which we submit is going to help us meet our burden of proving beyond a reasonable doubt that this was an INTENTIONAL ACT. (id at PAGE 171, LINES 4-22 EXHIBIT 4)

So the state claims conclusively that O'Keefe had a motive and that he unlawfully, intentionally stabbed Mrs Whitmarsh with a knife.

Now, we'll jump to closing key statements by the State. Then I will outline second trial opening and closing by the State for double jeopardy

- FOR STATE SECOND CHAIR, MS. GRAHAM CLOSING ARGUMENT TRIAL # 1

- On FRIDAY, MARCH 20, 2009 the State argues what they feel they proved.

(FRIDAY, MARCH 20, 2009 ROUGH DRAFT TRANSCRIPT JURY TRIAL DAY 5 EXHIBIT 5)

... The State's position is that this is first degree murder with a deadly weapon... (id at RDT Page 130, lines 22-23) ... But what is malice aforethought ?, INTENTIONAL KILLING... OKAY, so it's INTENTIONAL. An INTENTIONAL KILLING without legal cause or excuse... (id at RDT Page 134, lines 22-25) ... What is second degree murder ? The killing ... Just INTENTIONAL. (id at RDT Page 137 lines 6-7) ... what is willfulness ? The intent to kill. The intent to kill__ you intend it, kill. That's willful... (id at RDT Page 135, lines 21-25) ... Our contention is that a knife was the deadly weapon... (id at RDT Page 138, lines 11-12) ... this is how we know it's first degree murder. It wasn't an accident. It was WILLFUL... It was willful. THE ACT of STABBING VICTORIA WAS WILLFUL...

(id at RDT Page 139, lines 15-25) Now, a "Key" STATEMENT was made.

: This is much more than SECOND DEGREE MURDER. SECOND DEGREE WOULD ONLY APPLY if defendant ACTED INTENTIONALLY...

(id at RDT Page 145, lines 16-18)

- FOR STATE LEAD, MR. SMITH CLOSING ARGUMENT TRIAL # 1

TWO 's : ...That's certainly circumstantial evidence of a BATTERY or something that precipitated the STABBING.

(id at RDT Page 177, lines 1-2)

...The Law says you determine a persons INTENT at the moment they COMMIT the ACT... a lot of times people are sorry that they kill somebody after it's happened and/or before they get caught. But it doesn't mean__ it doesn't MAKE THE UNDERLYING ACT ANY LESS CRIMINAL... (id at RDT Page 178, lines 16-21) The Alleged MERGED BATTERY ACT.

SECOND AMENDED INFORMATION

III. OPENING STATEMENT **SECOND TRIAL** CLOSING ARGUMENT

2. August 19 2010, in OPEN COURT, State Files their Second AMENDED INFORMATION. Again the State charges not only the SAME OFFENCE, but the same prosecution theory of the INTENTIONAL, UNLAWFUL, STABBING with a KNIFE. (SECOND AMENDED INFORMATION, C250620 EXHIBIT 6)

- On Wednesday, AUGUST 25, 2010 Opening Statement made by State on day 3.

(ROUGH DRAFT TRANSCRIPT JURY TRIAL DAY 3 WEDNESDAY, AUGUST 25, 2010 EXHIBIT 7)

- FOR STATE LEAD, MR. LALLI OPENING STATEMENT TRIAL #2

... BRIAN O'KEEFE was found guilty by a jury of felony battery constituting domestic violence in 2008. The victim in that case, Victoria Whitmarsh is the same woman he murdered on November 6th, 2008. The evidence will show that he STABBED her, that she suffered a fatal stab wound under her arm and that she died as a result of essentially bleeding out. ... Like most domestic violence relationships, there was a fatal attraction between the two.

(id at Page 23, lines 14-16 and id at Page 24, lines 16-18)

... The knife that was used to stab Victoria is located and impounded ...

(id at Page 29, lines 21-22)

: ... An anonymous domestic violence survivor once made this observation. If you can't be thankful for what you have, be thankful for what you have escaped. Well, unfortunately Victoria was not able to escape from the defendant, and he murdered her in a brutal way. (id at Pages 31-32, lines 24-25, lines 1-5)

- On TUESDAY, AUGUST 31, 2010 CLOSING ARGUMENT made by State.

(ROUGH DRAFT TRANSCRIPT JURY TRIAL DAY 7 TUESDAY, AUGUST 31, 2010 EXHIBIT 8)

- FOR STATE SECOND CHAIR, MS. GRAHAM CLOSING ARGUMENT TRIAL # 2

... I hate her and I want to kill her. She took three years of my life. (id at Page 81, lines 24-25) ... She sent me to prison. That's what the defendant said about Victoria Whitmarsh. He killed her on the night of November 6th, 2008. He did it INTENTIONALLY and he had a MOTIVE.

(id at Page 82, lines 1-3)

... I think you've heard statements and some evidence throughout these past few days that perhaps Victoria attacked him, that Victoria cut him.

(id at Page 84, lines 11-13)

... And malice aforethought can be either expressed or implied malice. The unlawful killing may be effective by any of the various needs by which (indiscernible) in this case a STABBING. Malice aforethought means the INTENTIONAL doing of a wrongful act ... (id at Page 87, lines 19-23)

... malice requires the INTENTIONAL ACT, INTENTIONAL UNLAWFUL ACT, THE STABBING ... (id at Page 91, lines 16-18)

 : ... To CONSTITUTE the crime CHARGED in this case it's SECOND DEGREE MURDER, there must exist a joint -- a union or joint operation of AN ACT that's forbidden by LAW and INTENT to do that ACT. In SUMMARY that means forbidden by Law, a murder, a stabbing, and the INTENT to do the ACT. The INTENTIONAL STABBING into Victoria's body. The intent with which an ACT is DONE ... (id at Pages 91, line 25; 92, lines 1-5)

●  At this point it is crystal clear that the State has not only charged, in the AMENDED INFORMATIONS, an unlawful intentional stabbing with knife, this theory was argued by state and proven by trial transcripts. At first glance of O'Keefe § 2241, U.S DISTRICT Judge GLORIA NAVARRO already admits in her ORDER that the COLLATERAL ESTOPPEL claim absolutely would appear to be based UPON DOUBLE JEOPARDY PROTECTIONS.

The U.S. DISTRICT JUDGE was more concerned with why this wasn't exhausted in STATE COURT first. It certainly will be now and is just one of the reasons this case is conclusively, OVER. Now on to [b.] Authorities and ARGUMENT, INFRA.

III.

b. ISSUE #2 - DECIDED ON DIRECT APPEAL IN FAVOR OF DEFENDANT

Before the case was reversed on appeal defendant's MOTION TO SETTLE RECORD was heard on APRIL 7, 2009. CRITICAL statements are made during this hearing. (TUESDAY, APRIL 7, 2009 ROUGH DRAFT TRANSCRIPT, MOTION TO SETTLE RECORD EXHIBIT 9) STATE, MR. SMITH and the Court both admit INSTRUCTION #18 is statutory correct in Language. (id at Page 3, lines 1-24)

Also, State admits O'Keefe was to drunk to form "INTENT", by JURY DECISION. (id at Page 5, lines 18-22)

OPEN: The Court himself places on record the fact the alcohol issue caused the Jury to acquit O'Keefe of INTENTIONAL MURDER (id at Page 6, lines 6-9)

"DECIDED" ON direct appeal, the argument arises from in fact INSTRUCTION #18. Defendant enters these 3 key instructions.

These 3 instructions are #1, #3, AND #18, defining Second degree Murder. (see INSTRUCTIONS TO THE JURY FILED IN OPEN COURT MARCH 29 2009 EXHIBIT 10)

Now to bolster my point defendant enters his REVERSAL ORDER. (see ORDER OF REVERSAL AND REMAND N.S.C. No. 53859 APRIL 7, 2010 EXHIBIT 11)

- N.R.S. 200.010 "MURDER" defined: Murder is the unlawful killing of a human being: 1.) with malice aforethought, either express or IMPLIED.

So the alleged single battery act is merged into the murder charge. Instruction #1 identifies case, scenario. Instruction #3 explains the States theory and describes the battery act merged. We also must keep in mind that N.R.S. 200.481 defines "battery" - (MEANS any intentional unlawful act of force upon the person of another.) IN CASE C250630, the ACT is described in INSTRUCTION #3 as the, INTENTIONAL, UNLAWFUL STABBING VICTORIA with knife. The Jury, as the trier of fact, ACQUITS O'Keefe of FIRST-DEGREE murder, the INTENTIONAL STABBING with KNIFE. However they return

a verdict of Second Degree murder implied, by the argued battery domestic violence in closing. Somehow, the jury is completely lost. When the jury acquitted the defendant of first degree murder, the ACT they acquitted me of APPLIED to either First or Second degree murder.

There was no other enumerated felony or inherently dangerous act committed by the defendant. Closing in on INSTRUCTION # 18 now.

The Nevada Supreme Court REVERSAL ORDER READS;

Here, the district court abused his discretion when he instructed the jury that second-degree murder includes involuntary killings that occur in the commission of an UNLAWFUL ACT because the State's charging document did not allege O'Keefe killed the victim while he was committing an unlawful act and the evidence presented at trial did not support this theory of SECOND-DEGREE MURDER.

- First, the state didn't have to allege any underlying act once they used malice aforethought. Second, if the state would have alleged a battery it wouldn't matter because the evidence presented at trial did not SUPPORT THIS THEORY of SECOND DEGREE MURDER - What theory?

INSTRUCTION # 18 Murder of the Second Degree is murder which is:

1) An unlawful killing of a human being with malice aforethought, but without deliberation and premeditation, or

2) Where an involuntary killing occurs in the commission of an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill

- NOTICE, theory #2 was the theory complained about and decided.

Theory one is nothing more than Second degree murder DEFINED.

Theory two is implied malice murder by the act. It is how you PROVE theory one. Mainly it is EXACTLY EQUAL in criminal culpability.

Also, felony murder has no "intent."

showing that Whitmarsh had a history of suicide attempts, depression, panic disorder and incidents with cutting herself with knives. 2 App. 265, 313. The relevant documents were included in Defense Proposed Exhibit B. 2 App. 265. The State argued that evidence of Whitmarsh's suicide attempts was not relevant because it did not constitute a violent act. 2 App. 266. The Court found that her attempted suicides were not acts of violence and found that the testimony and evidence from the medical records was not admissible. 2 App. 266. The district court also prohibited admission of evidence concerning her anger management classes. 2 App. 266.

O'Keefe wished to testify that as Whitmarsh's partner on and off since 2001, he was aware at the time of the incident of her mental health history, which included multiple suicide attempts, both by overdose and cutting herself with knives or scissors, was aware that she self-mutilated, was aware that she had uncontrollable anger outbursts, and problems when stressed and when abusing drugs or alcohol ,and that she was attending anger management counseling. 2 App. 256, 260. In addition, two nights before the incident, Whitmarsh confronted O'Keefe when he was reclining. She was yelling and brandishing a knife at him; however, as he was sober at the time, he was able to calm her down and diffuse the situation. 2 App. 269.

O'Keefe provided the State with Whitmarsh's medical records and sought admission of these records at trial as they would have corroborated his claims as to her aggression and anger problems and her anger management treatment. 2 App. 265; Exhibit B. Those records include an October 2001 Admission to Montevista Hospital, after she cut both wrists with a knife in what she reported was her fourth suicide attempt. She was on the medications Celexa, Xanax and Vistaril. She was diagnosed with Major Depressive Episode, Panic Disorder with Agoraphobia. It was during this hospitalization that she and O'Keefe met. Next, a May 2002 Admission to Montevista Hospital after she used Xanax, Lortab, Oxycotin; was blacking out and unable to function at work. Her withdrawal was severe. Those documents noted a psychiatric history of severe anxiety and depression; a hospitalization in October 2001 for OD and cutting her wrist; a hospitalization for an overdosed in 1983 and

a diagnosis of opiate dependence, continuous, Xanax dependence continuous, and major depression, recurrent. Next, she was admitted in September 2006 to Montevista Hospital for a variety of issues, including bipolar disorder and depression. The report noted that she had taken lethal dose of Xanax requiring intubation/mechanical ventilation h/o depression, also has self-inflicted wrist lac." The report noted at least 3 suicide attempts and that she has been self-mutilating for the pasts 15 years, she stated that she cuts herself when she is angry and the last time she cut her left wrist was with a pair of scissors on September 22, 2006. Her treatment included anger management. A Southern Nevada Adult Mental Health October 2007 admission showed that in October, Victoria took an overdose of pills in an apparent suicide attempt. Exhibit B.

O'Keefe sought to admit portions of the records from the 2001, 2002, and 2006 hospitalizations as corroborative evidence of his knowledge about Whitmarsh's and his state of mind regarding whether she was mentally capable and likely to cause him great bodily harm when she came at him with a knife. 2 App. 265. Additionally, he was aware of and had the opinion that Whitmarsh could be irrational and had a temper problem that caused her to be aggressive and violent, especially when she was under the influence of alcohol or drugs. The district court, despite full briefing on the issue by O'Keefe, precluded admission of the evidence. 2 App. 266.

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as the Nevada Constitution, article 1, section 8, protect a criminal defendant's right to a fair trial, at which he may confront and cross-examine witnesses and present evidence in his defense. Preclusion of this evidence violated O'Keefe's rights. Pointer v. Texas, 380 U.S. 400 (1965) (recognizing that the right of confrontation requires that a criminal defendant be given an opportunity to cross-examine the witnesses against him); Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (stating that "the rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process"). Preclusion of this evidence also violated O'Keefe's statutory rights. NRS 48.045(1)(b); NRS 48.055(1). This Court has interpreted these statutes to

[illegible] of the character of an alleged victim regardless of the accused's knowledge of the victim's character when it tends to prove the victim was the likely aggressor. Petty v. State, 116 Nev. 321, 326-27, 997 P.2d 800, 802-03 (2000). Attempts to commit suicide, especially when those attempts are made with knives or other cutting instruments, and acts of self-mutilation with cutting instruments constitute acts of aggression or violence. Such evidence is relevant under the circumstances presented here. State v. Stanley, 37 P.3d 85, 90 (N.M. 2001) (collecting cases and noting that a clear majority of courts hold that evidence of suicide attempts by a victim in a homicide case is admissible); People v. Salcido, 246 Cal.App.2d 450, 458-60 (Cal.App. 5th Dist. 1966) (same); State v. Jaeger, 973 P.2d 404, 407-08 (Utah 1999) (medical records, containing statements that the victim had previously attempted suicide, were admissible when introduced in a case where defendant claimed the victim committed suicide).

Further, at the time of the incident, O'Keefe was aware of Whitmarsh's prior acts of violence and aggressive character. This Court has held that if the accused, who is claiming he acted in self-defense, is aware of specific acts of violence by an alleged victim, then evidence as to those specific acts is admissible to show the accused's state of mind at the time of the allege crime. Id. at 326-27, 997 P.2d at 803; Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003) ("[A] defendant should be allowed to produce supporting evidence to prove the particular acts of which the accused claims knowledge, thereby proving the reasonableness of the accused's knowledge and apprehension of the victim and the credibility of his assertions about his state of mind. . . . The self-serving nature of an accused's testimony about prior violent acts of the victim makes corroborating evidence of those acts particularly important for an accused's claim of self-defense."). "[W]hen a defendant claims self-defense and knew of relevant specific acts by a victim, evidence of the acts can be presented through the defendant's own testimony, through cross-examination of a surviving victim, and through extrinsic proof." Id. at 516, 78 P.3d at 32-33. O'Keefe was entitled to present this evidence. He is entitled to a new trial based upon the district court's order

prohibiting his counsel from presenting this evidence.

B. The district court erred, and denied O'Keefe his state and federal constitutional rights to due process and a fair trial, by refusing to strike an erroneous jury instruction and instead directing the State not to rely upon the erroneous instruction in its closing argument. The parties settled jury instructions in chambers. At that time, O'Keefe's counsel objected to the State's proposed instruction defining second degree murder, citing Jennings v. State, 116 Nev. 488, 998 P.2d 557 (2000), and argued they had no notice of a second degree felony murder theory and the second paragraph of the State's instruction set forth a felony murder theory. 2 App. 384. The district court determined that the State's proposed instruction defining second degree felony murder in paragraph #2 would not be given because no such theory had been alleged in the Information. 2 App. 384, 388. After the parties returned, made a record of objections, the district court passed out the final instructions just before instructing the jury. 2 App. 296, 384. The reading of the jury instructions was not transcribed, but the record reflects that a bench conference was held during the reading of the instructions. 2 App. 296-97. When the district court got to the instruction (#18) defining "Murder of the Second Degree", the parties approached the bench, and the district court noted that it understood the jury was not going to be instructed on second degree felony murder. 2 App. 384. O'Keefe's counsel agreed with this understanding, and stated that the instruction should not be given with the second paragraph. 2 App. 384. The State argued that they simply would not argue the theory to the jury. 2 App. 384. O'Keefe's counsel argued that this solution was not satisfactory because the jury might still understand that they could find the theory from the district court's instruction. 2 App. 384. The district court overruled O'Keefe's objection and gave the instruction which it knew to be erroneous. 2 App. 384, 388. The jury was instructed in the second paragraph of Instruction #18 that "[W]here an involuntary killing occurs in the commission of an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill." 2 App. 354.

During closing arguments, the prosecutor argued that a finding of murder could be based upon implied malice. 2 App. 298-299. O'Keefe's counsel objected to this argument and a conference was held at the bench, but it was not recorded. 2 App. 299. The jury was not instructed to disregard this argument and was not instructed that the second paragraph of Instruction #18 could not be used as a basis for a conviction.

O'Keefe's state and federal constitutional rights to a fair trial, proper jury instructions, and notice of the charges against him were violated by the district court's actions. It is entirely unprecedented for a district court to give a jury instruction, despite a previous order that the instruction would not be given, with full knowledge that the jury instruction was unsupported by authority from this Court. Likewise, there is no precedent holding that such an instruction may be given so long as the prosecutor does not argue the erroneous and unconstitutional theory to the jury. There is no valid question as to the fact that this jury instruction was improper. The State failed to charge O'Keefe with felony-murder and he was given no notice of the State's intent to prosecute him under a felony-murder theory. A defendant has a fundamental right to be clearly informed of the nature and cause of the charges in order to adequately prepare his defense. Jennings, 116 Nev. at 491, 998 P.2d at 559 (citing Sheppard v. Rees, 909 F.2d 1234, 1236 (9th Cir. 1989), Cole v. Arkansas, 333 U.S. 196 (1948)). See also Alford v. State, 111 Nev. 1409, 1415, 906 P.2d 714, 717 (1995). Despite the fact that the State did not charge O'Keefe under a second-degree felony murder theory, the jury was instructed on this theory of prosecution and under the facts presented here, the jury may have very well relied upon this instruction in reaching its verdict. Reversal of the judgment is therefore required. Cortinas v. State, 195 P.3d 315, 320-21 (Nev. 2008).

C. The district court erred, and denied O'Keefe his state and federal constitutional rights to due process and a fair trial, by allowing a transportation officer, Officer Hutcherson, to testify that O'Keefe told him to "turn that nigger music off" and said "I don't listen to nigger music." 1 App. 135. This testimony was sprung upon the defendant during trial without any prior notice. O'Keefe's counsel asked to approach the bench and an unrecorded bench conference took place. 1 App. 135. The officer did not write a report about this

matter, did not give a recorded statement, and did not state that this happened in his handwritten note. 1 App. 136. Although the State was aware of these alleged statements O'Keefe's counsel were not given notice of this highly prejudicial statement. The State did not request a Petrocelli hearing to establish the admissibility of this highly inflammatory and irrelevant evidence. 1 App. 153, 159. The State argued that no discovery violation occurred because the statement was not memorialized and it was not exculpatory. 1 App. 153. The district court ruled that there was no discovery violation and found that O'Keefe was not prejudiced by the testimony. 1 App. 154. O'Keefe's counsel noted that some jurors reacted strongly to the testimony. 1 App. 159. Counsel further noted that the testimony was especially prejudicial as the police officer and one of the prosecutors, and at least one juror, were African-American and testimony concerning the racial slur was likely to cause the jurors to more closely align themselves with the State because of empathy to the officer or prosecutor or because of anger toward O'Keefe. 1 App. 159. Additional prejudice was present as O'Keefe and Whitmarsh were of different races. Counsel requested a mistrial based upon the State's intentional non-disclosure of the evidence, the highly prejudicial testimony, and the inability to conduct voir dire on racial bias which would have been conducted had the statement been disclosed. 1 App. 159. The State offered an additional reason as to why it believed the testimony to be relevant:

> Now, prejudicial, yes. But probative, very probative as to the state – this is a first degree murder trial. The intent and state of mind of the defendant before, during and after the murder, the stabbing of Victoria, is very important to this case. The fact that he's angry, mean, violent, and is spewing racial slurs is in the State's opinion probative and relevant to the case.

1 App. 164. The district court again denied the motion for a mistrial. 1 App. 164.

Improper references to race can be so prejudicial as to result in a denial of due process. Moore v. Morton, 255 F.3d 95, 114 (3rd Cir. 2001). There is no suggestion here that this incident in any way involved racial animosity. Admission of the evidence rendered the trial fundamentally unfair, resulting in a denial of due process. The evidence constituted evidence of bad character which permitted the jury to infer that O'Keefe committed the charged offense because of his bad character. This evidence uniquely tended to evoke an

emotional bias against O'Keefe but had no relevance to the issues of this case. Moreover, admission of this evidence violated O'Keefe's First Amendment rights. Dawson v. Delaware, 503 U.S. 159 (1992). In addition, the State's use of this evidence, as established by the State's remarks above, was an improper use of character evidence. NRS 48.045; Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001). For each of these reasons the judgment of conviction must be reversed.

D. The district court erred by allowing photos of bruises on the body of the deceased despite the lack of relevance to this case due to the difficulty in determining the time of the bruising with the deceased's Hepatitis C and cirrhosis issues. The medical examiner testified that none of the bruises were life threatening and could have been caused by minimal contract, and could have been inflicted by Whitmarsh herself or another person. 1 App. 182. Although no causation or association with the incident was established, the district court admitted as evidence numerous photographs of bruises on Whitmarsh's body. 1 App. 182 (admitting exhibits 32-38, 40, 44-48, and 55-59). Many of these photographs were also referenced during closing arguments. 2 App. 299. O'Keefe has filed a motion requesting that these photographs be transmitted to this Court so that their prejudicial impact may be fully appreciated by the Court. O'Keefe objected to the admission of photographs showing bruising on Whitmarsh's body unless there was a foundation for the assertion that they were caused by O'Keefe and were not the result of other incidents combined with her cirrhosis of the liver medical condition. 1 App. 86, 189. Despite the lack of foundation showing a nexus between the bruises and the events at issue here, and despite their highly prejudicial and inflammatory nature, the district court admitted this evidence. It was error to do so. NRS 48.035; Townsend v. State, 103 Nev. 113, 117-18, 734 P.2d 705, 708 (1987). Admission of this evidence violated O'Keefe's constitutional right to a fair trial. Spears v. Mullin, 343 F.3d 1215, 1225-26 (10th Cir. 2003); Romano v. Oklahoma, 512 U.S. 1, 12 (1994).

E. The district court denied O'Keefe his state and federal constitutional rights to a fair trial by allowing a police detective to testify and offer his "expert" opinion whether the wounds on O'Keefe's hands were defensive wounds, while also denying O'Keefe the right

to call his own expert to testify as to whether or not the wound on the deceased could have been caused by an accident. Over an objection by O'Keefe's counsel, Detective Wildemann testified that in his experience as a homicide detective, it has frequently been the case that a suspect in a stabbing has cuts on his fingers on the same area that O'Keefe had a cut on his hand. 1 App. 203. O'Keefe's counsel objected on the basis that the detective was not an expert. 2 App. 211. The district court employed a different standard, however, when it precluded a defense expert from testifying as to whether the crime scene suggested that the death might have been accidental. 2 App. 246. The defense expert, George Schiro, had extensive experience as a forensic scientist and crime scene reconstruction and he had previously testified as to whether wounds were defensive or accidental. 2 App. 240-41, 246-48, 253-54. The district court found that the question was beyond Schiro's expertise and beyond what was identified in his report. 2 App. 248. The district court abused its discretion in allowing the State's expert to testify about his opinion as to the defensive nature of wounds without first establishing that the expert was qualified to make such an opinion. Hallmark v. Eldridge, 189 P.3d 646 (Nev. 2008). This action usurped the jury's function and violated O'Keefe federal constitutional rights to due process and a fair trial. The district court also violated O'Keefe's rights of equal protection and due process by employing a different standard for admission of testimony by a defense expert. Finally, the district court violated O'Keefe's federal constitutional rights of cross-examination and confrontation, and his right to present evidence on his behalf, by precluding the defense expert from testifying. Pointer v. Texas, 380 U.S. 400 (1965) (recognizing that the right of confrontation requires that a criminal defendant be given an opportunity to cross-examine the witnesses against him); Chambers v. Mississippi, 410 U.S. 284, 294 (1973)

F. O'Keefe submits that the district court abused its discretion, erred, and violated O'Keefe's state and federal constitutional rights by refusing several instructions proffered by the defense and by overruling several instructions which were objected to by the defense. Specifically, the district court refused to give an anti-flight instruction. 2 App. 230, 294, 326. Cf. Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005). The court overruled

O'Keefe's instruction to the State's proffered malice instruction. 2 App. 294, 322. The court overruled O'Keefe's objection to the "absolute necessary" language of the self-defense instruction. 2 App. 294, 328. The court overruled O'Keefe's proffered instruction on voluntary manslaughter and the heat of passion and overruled the defense objection to the instruction given at trial on these issues. 2 App. 294, 296, 329-32. See Crawford v. State, 121 Nev. 746, 752, 121 P.3d 582, 587-88 (2005). The court overruled O'Keefe's proffered instruction on good character. 2 App. 295, 333. See Emerson v. State, 98 Nev. 158, 162, 643 P.2d 1212, 1214 (1982); Beddow v. State, 93 Nev. 619, 624, 572 P.2d 526-29 (1977). The failure to give the instructions proffered by the defense, and the giving of instructions objected to by the defense, deprived O'Keefe of his state and federal constitutional rights to have the jury properly instructed on the elements of the offense and deprived him of a fair trial. See Sandstrom v. Montana, 442 U.S. 510 (1979). Reversal is also warranted for the cumulative error involving jury instructions and the other issues presented herein.

24. **Preservation of issues.** All issues raised herein were preserved by timely objections at the time of trial and/or by pretrial motions, as set forth above.

25. **Issues of first impression or of public interest.** Yes. O'Keefe respectfully renews his request for full briefing so that each of these issues may be adequately set forth and so appropriate legal authority may be cited in support of each of the issues presented.

VERIFICATION

I recognize that pursuant to N.R.A.P. 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information, and belief.

Dated this __ day of August, 2009.

JoNell Thomas

exhibit 17

C250630

MOTION TO SETTLE RECORD
HEARD APRIL 7, 2009

FILED JULY 10, 2009

exhibit 17

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * * *

COPY

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

DEPT. NO. 17

FILED
JUL 10 2009
CLERK OF COURT

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, APRIL 7, 2009

ROUGH DRAFT TRANSCRIPT OF
DEFENDANT'S MOTION TO SETTLE RECORD

APPEARANCES:

FOR THE PLAINTIFF: PHILLIP SMITH, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT: RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
(303) 798-0890

LAS VEGAS, NEVADA, TUESDAY, APRIL 7, 2009, 9:07 A.M.

THE COURT: State of Nevada versus Brian O'Keefe. This is defendant's motion to settle the record, and if I can sort of paraphrase here, it's Mr. Pike's position that on some of the jury instructions that perhaps all of his -- from the arguments of the instructions you wanted to give as well as some that you objected to were not completely stated on the record. Is that correct?

MS. PALM: Well, your Honor, it's -- we're settling the record as to the second degree murder instruction which was instruction number 18. It's spelled out in my declaration. I believe as to that instruction we had agreed in chambers that it would not be given as written. And then when the Court got the final instructions to us right before the reading of them, the Court called us up to the bench having realized that it was supposed to be altered to delete the second degree felony murder theory, and the State had indicated, well, we won't argue that theory, and they did not argue it.

But it was our position at the bench that that would not correct it because the jury could still find it having been instructed in it. And so we just wanted to make we made a clear rod of that one issue. And if the State doesn't recall that any different, I'll move onto the other issue.

MR. SMITH: Well, how the State recalls it, Judge,

was that we had a dispute whether or not the language that was contained in the instruction that was ultimately submitted to the jury was, in fact, a felony second degree murder instruction. And it was our understanding that your Honor instructed us not to argue that the defendant committed the homicide in the commission of any felony, and we didn't, and that there wouldn't be a problem.

So I just want to make sure that the record's clear we have with the State that it was our contention that the precise language that was submit that in the instruction that actually went to the jury did not rise to the second degree felony murder instruction.

THE COURT: I think that was the Court's recollection that I kept the language in over the objection of the defense attorneys, but I did admonish the prosecutor that they were not going to argue felony murder rule on the case, and that's my recollection, they did not in closing.

MR. SMITH: And that's correct. Now, if the defense is contending that not with stand being the Court's decision that the language that was actually contained in that instruction, in fact, arose to a second degree felony murder instruction, then I mean, all I can say is the State respectfully disagrees and we can just let an appellate court determine that.

MS. PALM: Well --

THE COURT: Okay.

MS. PALM: -- and my contension exactly, your Honor, is that the Court was not going to give that instruction as written. It was a mistake at that it ended up in the final packet, and I don't think it was corrected by the State simple yeah not arguing the second degree felony murder. And I do think that was a second degree felony murder instruction, and so that would be --

THE COURT: Okay.

MS. PALM: And then as to the other issue, it was Detective Mogg's testimony, and we had -- if the Court recalls that we had called Detective Mogg to testify as a witness. He was not relate today this case, but it was that in 2007 he had another case which actually was my case. It was State versus Francis Bill Franco Ardonias (phonetic) was a murder suspect who claimed to be intoxicated, and Detective Mogg arranged for him to have a Beth test for alcohol, and I was going to ask the detective, you know, was that possible to be done, how was it done, what's the training for Metro on that, and did it, in fact, happen in that case, and did you arrange it, and you know, why did you arrange it.

And Court ruled on the State's objection that it was collateral and not relevant to this case. Our argument that it was relevant because it showed the bad faith of the State -- or the lack of good faith State investigation and the State's

motive most minimize the alcohol intoxication in Mr. O'Keefe at the time of the offense. So the Court overruled our objection to it, and then I had no more questions for Detective Mogg. He stepped down as a witness. I just wanted to make sure our record was clear on that.

MR. SMITH: I actually have two replies. If I remember correctly, it was the State's position that the detective in question, which I believe it was Detective Marty Wildemann, simply testified that to his knowledge there was no other case where a homicide detective took a breath test from a suspect or defendant prior to conducting an interview. And it was -- if I recall correctly, it was our position that simply because another detective in an independent case of his own accord decided to take a breath test from a suspect, which clearly was not any part of any established protocol, that they couldn't simply use that to say well, the Government acted in bad faith because Detective Wildemann didn't do in this case.

Furthermore, I would suggest that the issue was actually entirely moot because it stands to reason that the reason why they didn't find the defendant guilty of first degree murder was because they bought into the defense's contention that he was too drunk to form the iment.

MS. PALM: And your Honor, I'm not arguing the appeal here so it doesn't matter if it's moot or not.

THE COURT: All right.

MR. SMITH: Oh, I know. I'm just making a record for
–

MS. PALM: I'm settling the record.

MR. SMITH: I'm just making a record for the law clerk who's ultimately going to get this.

THE COURT: All right, well, I think the record is clear in that regard, and, you know, I think that's why the jury did come back with a second as opposed to a first because of alcohol issue. All right, record's clear?

MS. PALM: Thank you.

MR. SMITH: Thank you, Judge.

THE COURT: Thank you very much.

MR. SMITH: Have a good day.

THE COURT: You too.

ROUGH DRAFT TRANSCRIPT

exhibit 18

C250630 Reflects C2500630

STATE'S MOTION OPPOSITION

AUGUST 12, 2010

Defendant charged only with
"Malice" murder

exhibit 18

TO:Patricia Palm, Esq. COMPANY:

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
christopher.lalli@ccdanv.com
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN K. O'KEEFE

Defendant.

Case No: C2500630
Dept. No: XVII

Date: August 12, 2010
Time: 8:15 a.m.

STATE'S OPPOSITION TO MOTION TO ADMIT EVIDENCE SHOWING LVMPD HOMICIDE DETECTIVES HAVE PRESERVED BLOOD/BREATH ALCOHOL EVIDENCE IN ANOTHER RECENT CASE

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through CHRISTOPHER J. LALLI, Chief Deputy District Attorney, and hereby opposes the Defendant's Motion to admit evidence from other homicide cases. This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

DATED this 10th day of August, 2010.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY */s/ Christopher J. Lalli*
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398

> This is not, and has never been, the law in Nevada. ... "While the authorities are not all agreed, the great weight thereof in this country is to the effect that mere intoxication cannot reduce murder to manslaughter." Appellant has advanced no persuasive reason, and we perceive none, why we should now change this rule. The refusal to give the instruction was correct.

Id. at 251-252 (quoting *State v. Fisko*, 58 Nev. 65, 77 (1937), and citing *Lisby v. State*, 82 Nev. 183 (1966) and *Stewart v. State*, 92 Nev. 168 (1976)). In this case, the Defendant is only charged with a malice murder. Therefore, as the Nevada Supreme Court recognized in *Leaders*, voluntary intoxication is not a defense to that charge. To admit such evidence would only serve to prejudice, confuse and mislead the jury.

CONCLUSION

Based upon all of the foregoing, the State respectfully requests that the Defendant's Motion to Admit Evidence Showing LVMPD Homicide Detectives have Preserved Blood/Breath Alcohol Evidence in Another Recent Case be denied.

DATED this 10th day of August, 2010.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY */s/ Christopher J. Lalli*
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing was made this 10th day of August, 2010, by facsimile transmission to:

PATRICIA PALM, ESQ.
FAX: (702) 386-9114

BY: /s/ Jennifer Georges
Secretary for the District Attorney's Office

exhibit 19

Case No. C250630

Second - AMENDED INFORMATION

FILED AUG 19, 2010

exhibit 19

AINF
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

FILED IN OPEN COURT
AUG 19 2010
CHARLES J. SHORT
CLERK OF THE COURT
BY CAROL DONAHOO
DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
BRIAN KERRY O'KEEFE,
#1447732
Defendant.

Case No. C250630
Dept No. XVII

SECOND AMENDED INFORMATION

STATE OF NEVADA
COUNTY OF CLARK } ss:

DAVID ROGER, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That BRIAN KERRY O'KEFFE, the Defendant above named, having committed the crime of **MURDER OF THE SECOND DEGREE WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165)**, on or about the 5th day of November, 2008, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did then and there wilfully, feloniously, without authority of law, and with malice aforethought, kill VICTORIA WHITMARSH, a human being, by stabbing at

///

///

and into the body of the said VICTORIA WHITMARSH, with a deadly weapon, to-wit: a knife.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY _____
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398

In addition to any other Notice of Witnesses, names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME	ADDRESS
ARMBRUSTER, TODD	5001 OBANNON DR #34 LVNV
BALLEJOS, JEREMIAH	LVMPD #8406
BENJAMIN, JACQUELINE DR	ME 0081
BLASKO, KEITH	LVMPD #2995
BUNN, CHRISTOPHER	LVMPD #4407
COLLINS, CHELSEA	LVMPD #9255
CONN, TODD	LVMPD #8101
CUSTODIAN OF RECORDS	CDC
CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
CUSTODIAN OF RECORDS	LVMPD RECORDS
FORD, DANIEL	LVMPD #4244
FONBUENA, RICHARD	LVMPD #6834
HATHCOX, JIMMY	3955 CHINCHILLA AVE LVNV
HUTCHERSON, CHRISTOPHER	LVMPD #12996
IVIE, TRAVIS	LVMPD #6405
KYGER, TERESA	LVMPD #4191

P:\WPDOCS\INFO\[illegible].DOC

KOLACZ, ROBIN	5001 EL PARQUE AVE #38 LVNV
LOWREY-KNEPP, ELAINE	DISTRICT ATTORNEY INVESTAGATOR
MALDONADO, JOCELYN	LVMPD #6920
MORRIS, CHERYL	C/O DISTRICT ATTORNEY
MURPHY, KATE	LVMPD #9756
NEWBERRY, DANIEL	LVMPD #4956
PAZOS, EDUARDO	LVMPD #6817
RAETZ, DEAN	LVMPD #4234
SANTAROSSA, BRIAN	LVMPD #6930
SHOEMAKER, RUSSELL	LVMPD #2096
TAYLOR, SEAN	LVMPD #8718
TINIO, NORMA	2992 ORCHARD MESA HENDERSONNV
TOLIVER, CHARLES	1013 N. JONES #101 LVNV
TOLIVER, JOYCE	1013 N. JONES #101 LVNV
WHITMARSH, ALEXANDRA	7648 CELESTIAL GLOW LVNV
WHITMARSH, DAVID	7648 CELESTIAL GLOW LVNV
WILDEMANN, MARTIN	LVMPD #3516

DA#08F23348X/ts
LVMPD EV#0811053918
(TK9)

2:11-CV-02109-GMN-VCF

exhibit 20

Case No. 0250 630

PROFFERED INSTRUCTION

3RD TRIAL

ROA pg. no. 0000 24

S.C.N. Direct Appeal #61631

exhibit 20

INSTRUCTION NO. ____

The abandoned and malignant heart implied malice requires that the State prove beyond a reasonable doubt that Brian O'Keefe acted with an extreme recklessness regarding homicidal risk. That is, he must have intended to commit acts which caused the death of Victoria Whitmarsh, he must have known that his acts were likely to cause her death, and he must have consciously disregarded the risk to her life.

exhibit 21

CASE NO. CR50630

S.C.N. # 58109

FILED APR 08 2011 08:51 a.m.

SUBSEQUENT SECOND-TRIAL MISTRIAL

exhibit 21

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE, Petitioner, EIGHTH JUDICIAL DISTRICT COURT; THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE, Respondents, And THE STATE OF NEVADA, Real Party in Interest.	Supreme Court No. 58109 District Court Case No. C250630 Electronically Filed Apr 08 2011 08:51 a.m. Tracie K. Lindeman PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION, AND REQUEST FOR STAY OF TRIAL

Petitioner Brian Kerry O'Keefe, by and through his counsel Patricia A. Palm, hereby moves this Honorable Court for a Writ of Mandamus, or in the alternative, a Writ of Prohibition pursuant to NRAP 21, Article 6 § 4 of the Nevada Constitution, NRS 34.160 and NRS 34.320. Petitioner has satisfied the procedural requirements of verification and service. See Attached.

Parties and Procedural History

Petitioner O'Keefe is the defendant in the case of State v. O'Keefe, Eighth Judicial District Court, Case C250630, wherein he was first charged by Information with one count of Open Murder with Use of a Deadly Weapon. He invoked his speedy trial rights and was tried before a jury in March, 2009. The jury found him guilty of Second-Degree Murder, and a Judgment of Conviction was filed on May 8, 2009. O'Keefe directly appealed to this Court, and on April 7, 2010, this Court reversed his conviction for error in jury instruction. The case was retried on a Second Amended Information alleging one count of Second-Degree Murder with Use of a

Deadly Weapon. O'Keefe unsuccessfully moved for a mistrial based on repeated prosecutorial misconduct, including attempts to argue domestic battery syndrome as a theory of guilt and a community cause. The District Court denied O'Keefe's request for instruction on Involuntary Manslaughter. The jury deadlocked, and a mistrial was declared on September 2, 2011.

O'Keefe again requested a speedy trial, and trial was set for January 24, 2011. The State sought to introduce new domestic battery-related bad act evidence and also noticed for the first time an expert in battered women's syndrome. O'Keefe sought to preclude this evidence, and also filed a Motion to Dismiss based on Double Jeopardy and Speedy Trial violations, which the district court denied. The district court declined to stay or continue the trial for O'Keefe to pursue a petition for extraordinary relief to this Court; however, the district court then continued the matter because O'Keefe was not prepared to defend against the new bad act evidence ruled admissible. The district court set the Petrocelli hearing for April 12, 2011, and reset trial for June 6, 2011.

Respondent Judge Villani has presided over this case at the two previous trials and currently presides over the district court case.

Real Party in Interest State of Nevada is the entity prosecuting Petitioner O'Keefe and is the party which prosecuted him during the prior two trials.

Synopsis of the Legal Arguments

Petitioner O'Keefe contends that the Double Jeopardy, Speedy Trial and Due Process provisions of the United States and Nevada Constitutions and NRS 178.556 prohibit another trial. Alternatively, if a third trial is not barred, then this Court's intervention is needed because the district court's determination that O'Keefe is not entitled to an Involuntary Manslaughter instruction as a lesser included offense of Second-Degree Murder will deny

12-15271

him his rights to due process and to present a defense as granted by the United States Constitution and Nevada Constitutions.

A Writ of Mandamus and/or Prohibition Is The Appropriate Remedy

Petitioner O'Keefe will suffer irreparable harm by having to stand trial for a third time. O'Keefe has been in custody since 2008, and has suffered the continuing anxiety and risks of enhanced possibility of conviction attendant to repeated trials and now must suffer further delay and prepare for a third trial, at which the State will benefit from its prior misconduct and he will be denied a fair proceeding. The matters presented here concern purely legal issues which do not require factual inquiries.

This Court will issue a writ of mandamus "'to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously.'" Hidalgo v. Dist. Ct., 124 Nev. ___, ___, 184 P.3d 369, 372 (2008) (quoting Redeker v. Dist. Ct., 122 Nev. 164, 167, 127 P.3d 520, 522 (2006)). A writ of prohibition "serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction." Sonia F. v. Dist. Ct., 125 Nev. ___, ___, 215 P.3d 705, 707 (2009). An extraordinary writ may be issued "where there is not a plain, speedy and adequate remedy" at law. NRS 34.330. In addition, where an important issue of law needs clarification and public policy is served by this Court's invocation of its original jurisdiction, consideration of a petition for extraordinary relief may be justified. Mineral County v. State, Dept. of Conserv., 117 Nev. 235, 243, 20 P.3d 800, 805 (2001). This Court has recognized that extraordinary relief might be available for similar double jeopardy pretrial claims. See Glover v. Eighth Jud. Dist. Ct., 125 Nev. ___, 220 P.3d 684 (2009). Petitioner O'Keefe has no other plain, adequate or speedy remedy at law to protect his rights. Judicial economy and sound judicial administration warrant issuance of the writ.

12-15271

Request for Relief

Wherefore, based on the foregoing and the accompanying Points and Authorities, Petitioner O'Keefe respectfully requests that this Court issue a Writ of Mandamus and/or Prohibition requiring Respondent to grant O'Keefe's Motion to Dismiss. In the alternative, O'Keefe requests that this Court order the district court to grant O'Keefe an Involuntary Manslaughter instruction at the future trial. If this matter cannot be determined before the scheduled trial date of June 6, 2011, O'Keefe requests a stay of trial.

Dated this 7th day of April, 2011.

PALM LAW FIRM, LTD.

/S/

Patricia A. Palm, Bar No. 6009
1212 S. Casino Center Blvd.
Las Vegas, NV 89104
Phone: (702) 386-9113
Fax: (702) 386-9114
Email: Patricia.Palmlaw@gmail.com
Attorney for Petitioner O'Keefe

POINTS AND AUTHORITIES IN SUPPORT OF WRIT

I. **Facts/Procedural History 2009 Trial:** The State charged Brian K. O'Keefe by Information filed December 19, 2008, with Murder with Use of a Deadly Weapon for the alleged November 5, 2008 killing of Victoria Whitmarsh. 1 Appendix (APP) 1. On January 20, 2009, he entered a plea of not guilty and invoked his rights to a speedy trial. 1 APP 5. The State filed a motion to admit evidence of other crimes, which O'Keefe opposed. 1 APP 7, 25. The State's motion addressed numerous bad acts but sought to introduce only one prior felony conviction. 1 APP 14. The district court ruled that the State could introduce evidence through witness Cheryl Morris, a woman whom O'Keefe had dated then rejected in favor of

12-15271

Whitmarsh, that O'Keefe had stated to Morris a desire to kill Whitmarsh for putting him in prison previously and also demonstrated to Morris his proficiency at how to kill with knives. (Whitmarsh was found dead with one stab wound to her side). The court further ruled that the State could introduce certified copies of O'Keefe's 2006 Judgment of Conviction for felony domestic battery, involving Whitmarsh. Further, if O'Keefe testified, then the State could inquire into his other prior felony convictions. Pursuant to the court's ruling on his prior Judgments of Conviction, the State was permitted to introduce only the details of when O'Keefe was convicted, in which jurisdiction, and the names of the offenses, and with the felony domestic battery, the fact that Whitmarsh had testified in that case. 2 APP 1-16. An Amended Information was filed. 1 APP 35. The State did not charge a theory of Felony Murder. Id. Trial began on March 16, 2009. 1 APP 71 During this trial, the parties understood that O'Keefe could introduce evidence of the loving and forward looking relationship of O'Keefe and Whitmarsh during the period after he was released from prison without opening the door to other bad acts. 2 APP 12-13.

The first trial lasted five days. 2 APP 71-369; 3 APP 370-494, 4 APP 495-597. Evidence was admitted to show that prior to the incident in question, O'Keefe and Whitmarsh appeared to be a loving couple and were open about their relationship. 2 APP 358 (Tr. 20-21); 4 APP 500, 503-04 (Tr. 32-34, 36).

O'Keefe testified at this trial that he met Whitmarsh in 2001 during inpatient treatment. He explained the circumstances at the time of the incident, and he denied intentionally killing her. 4 APP 539-60.

During trial, O'Keefe requested to introduce medical records regarding Whitmarsh's psychiatric history, and he filed a brief on the issue. However, the district court denied this request. 4 APP 550-51, 598. The Defense also moved unsuccessfully for a mistrial based upon prosecutorial misconduct,

12-15271

including the introduction of a racial slur allegedly made by O'Keefe. 3 APP 319 (Tr. 179), 439-440, 450. The jury was given the verdict of guilt options of First and Second-Degree Murder and Voluntary and Involuntary Manslaughter, each with and without use of a deadly weapon. 5 APP 693. The jury returned a verdict finding O'Keefe guilty of Second-Degree Murder with Use of a Deadly Weapon. Id. O'Keefe filed a motion to settle the record. 5 APP 694, 700. The district court sentenced O'Keefe to 10 to 25 years for Second-Degree Murder and a consecutive 96 to 240 months (8 to 20 years) on the deadly weapon enhancement. 5 APP 704. A Judgment of Conviction was filed on May 8, 2009. 5 APP 709.

O'Keefe directly appealed, arguing that the district court erred and denied O'Keefe his constitutional rights by (A) prohibiting him from introducing evidence of Whitmarsh's prior suicide attempts, bi-polar conditions, cutting and other acts, and anger management issues and treatment; (B) refusing to strike an erroneous jury instruction on an unnoticed theory of Second-Degree Felony Murder; (C) allowing an officer to testify that O'Keefe told him to "turn off that 'nigger' music"; (D) allowing photos of bruises on the body of the deceased despite lack of relevance to the case; and (E) allowing a police detective to testify and offer his expert opinion on the wounds to O'Keefe's hands. 5 APP 721-36. (F) ? omitted

This Court reversed O'Keefe's conviction and remanded for a new trial, concluding that the district court erred

> when it instructed the jury that second-degree murder involves involuntary killings that occur in the commission of an unlawful act because the State's charging document did not allege that O'Keefe killed the victim while he was committing an unlawful act and the evidence presented at trial did not support this theory of second-degree murder.

O'Keefe v. State, NSC Docket No. 53859, Order of Reversal and Remand (April 7, 2010). 5 APP 737-38. Further, the "error in giving this instruction

2. NO ISSUE "F" HAS BEEN OMITTED BY ATTORNEY From S.C.N # 53859

12-15271

was not harmless because it is not clear beyond a reasonable doubt that a rational juror would have found O'Keefe guilty of second-degree murder absent the error." Id. Remittitur issued on May 7, 2010, and O'Keefe's trial was reset for August 23, 2010. 5 APP 739; 6 APP 746-48.

II. **Facts/Procedural History 2010 Trial:** Prior to retrial, O'Keefe filed a motion to preclude evidence, which was granted, in part, and denied, in part, after hearings. 6 APP 749; 7 APP 956-92, 1028-41; 12 APP 2236. He also filed a motion to suppress his statements, which was granted, in part, and denied, in part, after hearing. This motion was partially based upon the district court's prior rulings regarding the limits on introduction of other bad acts evidence. 6 APP 826; 7 APP 996-1033. O'Keefe also noticed new expert witnesses. 6 APP 785. He filed a motion for discovery, which was granted, in part, and denied, in part after hearing. 6 APP 817, 873-77; 7 APP 957-67, 1097-98. O'Keefe renewed his request to admit evidence relating to Whitmarsh's mental health condition and history, and the district court ruled that the parties should reach a stipulation, but O'Keefe could not introduce evidence of Whitmarsh's actual diagnoses. The court then ruled upon the contents of the stipulation and denied O'Keefe's request to admit it as an exhibit. 6 APP 765 (incorporating Exhibit at 5 APP 598); 7 APP 982-91, 1034-35, 1099-1111; 11 APP 1794-1796. The Court also ruled that the Defense could admit evidence regarding what O'Keefe and Whitmarsh were seen doing together prior to the incident, but could not admit opinion evidence characterizing their renewed relationship as loving without opening the door to other bad acts. 8 APP 1246-50; 9 APP 1268-79.

During the voir dire, a defense objection to the State's query about battered women's syndrome was sustained, and the Court ruled that no reference to syndromes would be permitted. 7 APP 1111-13.

During trial, O'Keefe's Judgment of Conviction for the 2006 Felony Domestic Battery was admitted into evidence. 11 APP 1958-59. Cheryl

12-15271

Morris testified that she met O'Keefe in December, 2007. 9 APP 1280-84. On Father's Day, 2008, he resumed his relationship with Whitmarsh. 9 APP 1285, 1290-91. O'Keefe returned to Morris, however, and Whitmarsh was persistent in calling Morris. O'Keefe told Morris that he did not love her the same way as he did Whitmarsh. 9 APP 1305. O'Keefe said he was attracted to Whitmarsh because she was submissive. Id. at 1290. O'Keefe came to stay with Morris at her friend Dorothy Robe's house, where they lived as boyfriend and girlfriend for a month and a half. 9 APP 1286-87, 1290. During this time he talked about Whitmarsh and his anger and desire to kill her. 9 APP 1287-88. The prosecutor asked Cheryl Morris *"During those same conversations would the defendant tell you about his experience in the military and killing people?"* 9 APP 1288. She responded, "Yes. . . . He would describe to me some of the events that – how he would go through and it would either be kill or be killed and the type of weapon he would use. . . ." Id. at 1288-89. He would say that "he could take a knife and shove it towards . . . [the] sternum and then just pull up and that's how he would describe killing someone. Or perhaps coming from behind and . . . taking the knife from the left side of the neck to the right side." 9 APP 1289. Those conversations would not necessarily occur at the same time as he talked about Victoria. Id. When Morris did not want to be with O'Keefe, she could not leave without taking him out of Dorothy's house, so she agreed to move with him. 9 APP 1291. However, just after moving into the El Parque Avenue apartment together in late August, 2008, they broke up and O'Keefe left. He later called and said that he was bringing Whitmarsh home. 9 APP 1292-93. Whitmarsh also got on the phone and yelled at Morris. Id. at 1305. Morris denied being angry with O'Keefe for rejecting her, but her credibility was attacked during cross-examination. 9 APP 1297-1305, 1308-11.

Defense witness Dorothy Robe testified that Morris and O'Keefe lived with her for three months. She saw them every day. She never heard

12-15271

O'Keefe say that he wanted to kill Whitmarsh and never saw him demonstrate how to kill a person with knives. 11 APP 2006, 2008. Robe did not tell Morris that she wanted O'Keefe out of her house. Id. at 2009.

On November 5, 2008, beginning shortly after 9:00 p.m., a downstairs neighbor, Joyce Toliver, began hearing noise coming from O'Keefe and Whitmarsh's upstairs apartment. 9 APP 1331, 1343. The walls and floors at the apartment were pretty thin. Id. at 1407. There had never been noise up there before; the couple was very quiet. Id. at 1343, 1349. The only voice heard at the time of the incident sounded like a female and high pitched crying and moaning. Id. at 1345, 1356. Charles Toliver woke up from the noise about 10:00 p.m. He heard banging noises but not voices or arguing. After a while he hit the ceiling with a broom. About 15 minutes later, he heard a loud burst of noise and he went upstairs. 9 APP 1378, 1385-88, 1404, 1408-09. He hollered in the doorway of O'Keefe's apartment, and O'Keefe came to the bedroom door and said "Come get her man, come get her," as if something was wrong with her. Id. at 1392. Charles Toliver followed O'Keefe into the bedroom, where O'Keefe reached down and grabbed Whitmarsh, saying "Baby, wake up, baby wake up, don't . . . do me like this." Id. at 1395-96. O'Keefe was holding Whitmarsh's arms, trying to pick her up from the floor, and rocking her. Whitmarsh appeared to be unconscious. Id. at 1393-96, 1409, 1414-15. Charles ran outside and yelled for help. Id. at 1398.

Todd Armbruster testified that shortly after 11:00 p.m., he went with Charles Toliver to O'Keefe's apartment. O'Keefe was at the foot of the bed standing over Whitmarsh. 9 APP 1482, 1487. She was not moving and was naked from the waist down. O'Keefe was grabbing her legs and trying to lift her up. He was talking to her asking her to get up. Id. at 1487, 1495. Armbruster told O'Keefe "Hey, let me take a look at her." That's when O'Keefe stood up, took a swing at him and said, "Get the hell out of here."

12-1527

Id. at 1489, 1498-99. O'Keefe was stumbling, unsteady on his feet, was intoxicated and looked "tore up." Id. at 1498-1500.

Jimmy Hathcox, who lived next door to O'Keefe and Whitmarsh, had also heard a little ruckus going on which began about 10:00 p.m., but it did not seem out of the ordinary. 9 APP 1503, 1506-08. Hathcox never heard yelling, and the noises he heard from the apartment could have been someone banging things around in a temper fit. It sounded like a thumping noise and a repetitive voice. Id. at 1506, 1508. Later, Hathcox heard a bang on the rail outside, looked out and saw O'Keefe entering his apartment. O'Keefe did not appear to have anything in his hands or blood on his clothing. Id. at 1511-13. About 15 minutes after O'Keefe entered the apartment, Hathcox heard Toliver yelling for help. Id. at 1511.

Police responded to the scene at 11:06 p.m., but O'Keefe did not obey their commands that he leave the bedroom or Whitmarsh's body. O'Keefe yelled for officers to come into the room and stated that Whitmarsh was bleeding or breathing and had stabbed herself. At one point he said, "she's alive" and "she's dead." 9 APP 1525-26, 1528, 1530, 1543-44; 10 APP 1634-36, 1644-46, 1701. O'Keefe was mumbling and not very coherent. 9 APP 1543; 10 APP 1644-46. While lying next to Whitmarsh on the floor, he was caressing the back of her head and waving his arm up and down telling police to not look at her. She was naked from the waist down. 10 APP 1640-42, 1718-19. O'Keefe was tased twice, then arrested. 10 APP 1672-73, 1720-22. Police had O'Keefe in their custody by 11:13 p.m. 9 APP 1544. Officers were inconsistent in their testimony as to which of them went over to the other side of Whitmarsh's body during the arrest and whether O'Keefe was dropped at any point. 9 APP 1543; 10 APP 1642, 1650-52, 1655-57, 1674, 1682-83, 1686-87, 1703-06, 1711, 1730-32, 1734. It was possible that Whitmarsh was bumped during the arrest process and that O'Keefe went on top of her body during the tasing. It was also apparent that O'Keefe was

12-15271

extremely intoxicated. 10 APP 1684-86, 1704, 1732. After his arrest, O'Keefe was saying, "You're mad at me," and, "she tried to stab me." 10 APP 1699. While being held by a transportation officer, O'Keefe was obviously intoxicated, was loud, and was yelling, "What did I do, I'm not getting in the back of this car." 10 APP 1746, 1753-54. After about 5 to 10 minutes inside the car, O'Keefe passed out or fell asleep for a few minutes, then became conscious or awoke and starting talking or mumbling. 10 APP 1747-48, 1752-53. He began mumbling by himself and said, "That's why I love you V, because you're so crazy;" "What did I do wrong?;" and "I swear to God, V, I didn't mean to hurt you." He also said that he wanted to do the 10 years. 10 APP 1751-53.

O'Keefe was interrogated, and gave a rambling statement indicating he was not aware of Whitmarsh's death or its cause. The redacted interrogation was played for the jury. 11 APP 1970. Detective Martin Wildemann testified regarding the interrogation. Id. at 1960. The post-Miranda interrogation starts at 1:45 a.m., about two hours and forty-five minutes post incident. It continues until 2:01 a.m., which was the first break. That break lasted on hour, then O'Keefe was re-interviewed from 3:06 to 3:28 a.m. 11 APP 1960, 1973. Wildemann testified regarding his experience with stabbing homicide cases. Id. at 1956-57. He was allowed to opine, pursuant to the district court's pretrial rulings, that it is not uncommon for people to get cut while stabbing others. Id. at 1961. It occurs when they encounter some sort of resistance when the knife hits the body and their fingers will slide up the handle and hit the blade. 11 APP 1962, 1975-76. Wildemann had attended forensic classes but did not know how many, several over a long career. He attended a class in crime scene preservation years ago. He interpreted O'Keefe's finger injury as to meaning but he did not personally examine the thumb injury. 11 APP 1975-76. Wildemann also characterized O'Keefe during the interrogation as

12-15271

lacking in sincerity. 11 APP 1966, 1971. Detectives did not collect a sample of O'Keefe's blood because it was apparent that he was in full comprehension. Id. at 1965. However, Wildemann was aware of LVMPD policy allowing for blood draws and recognizing that blood alcohol level may be an important issue. Id. at 1980-81. Although Wildemann had previously testified there was no protocol for blood draws, he differentiates between policy and protocol. Id. at 1982. Wildemann was aware that the use of force report prepared by Officer Ballejos had been requested by the Defense, but its existence was denied. Wildemann stated that the detectives did not know of the report, which was ultimately turned over by court order. No other reports document that O'Keefe was extremely intoxicated. Id. at 1985, see also 10 APP 1685-86. Wildemann testified that O'Keefe ordered about the female interrogating detective and addressed her as "young lady." However the characterization of O'Keefe as having mistreated this female detective was challenged on cross-examination. 11 APP 1967, 1973-74, 1988-1994.

After the interrogation, O'Keefe's injuries were photographed to show the cut to his hand, bruising and scratches, and his clothing was impounded. O'Keefe was unable to stand without officer assistance during this evidence collection. 11 APP 1798-1824.

Law enforcement found no disarray in O'Keefe's apartment, except for in the bedroom where O'Keefe and Whitmarsh were found. There was a carving knife with an 8 inch blade on the bed, lying under a bloody pillow case, and analysis of it showed both Whitmarsh's and O'Keefe's blood, but no prints of comparison quality and no wipe marks. 9 APP 1523; 10 APP 1772, 1786; 11 APP 1852-53; 1892-1917; 1941-45. There was a laborer's union jacket on the floor by some blinds that had fallen to the floor. 10 APP 1773-74. There were also some bloody stretch pants on the bathroom floor. 11 APP 1927-28, 1947. O'Keefe had cuts on his right thumb and finger. 10

12-15271

APP 1582. O'Keefe's vehicle was photographed and showed that one of the seats inside was still reclined and glasses were in the center console. 12 APP 2044-49.

Defense forensic expert George Schiro testified that it was more likely that O'Keefe was cut while grabbing the blade in self-defense before Whitmarsh received her wound or that he cut himself accidentally or purposely after Whitmarsh was wounded than that he received his cut at the same time as she received hers. 10 APP 1590-94, 1596. Schiro also opined that the possibility of an accidental stabbing of Whitmarsh could not be ruled out by the physical evidence. Id. at 1596-97.

The Stipulation regarding Whitmarsh's mental health history was read to the jury. It showed that Whitmarsh attempted suicide in 2001 by cutting her wrists - this was her fourth suicide attempt, which was prompted by an argument with her husband which caused her to get angry and go berserk. She again attempted suicide in 2006 by cutting her wrists and overdosing after an argument with her then-estranged husband, and she admitted to cutting herself when angry, self-mutilating for 15 years, having problems with anger outbursts, poor anger management and impulse control, and having previously stabbed herself in her hands because she was not happy. 11 APP 2002-06.

The State's medical examiner, Dr. Benjamin, ruled the cause of Whitmarsh's death was a single stab wound to the side of the body into the liver, with a contributing factor of blunt trauma, and the cause of death was homicide. 8 APP 1210, 1216, 1219. However, neither she, nor the Defense's expert Medical Examiner, Dr. Grey, could rule out accident or suicide based on the physical evidence. 8 APP 1190, 1239, 1241-42; 9 APP 1428-29. Dr. Grey explained that the location of the knife wound was such that it could have resulted from a struggle over the knife where Whitmarsh was holding the knife in her right hand, and a fall on the bed. There was a small

12-15271

puncture next to the wound that would be consistent with the knife striking the skin during a struggle. 9 APP 1426. The depth of the wound also indicated it could have been caused accidentally because the knife only was inserted 4 ¼ inches into the liver, and nothing bony would have stopped it from going further. 9 APP 1427. In addition, a small mark next to the stab wound might have been a hesitation mark indicating a self-inflicted stabbing. Id. at 1428. Both doctors agreed that Whitmarsh had both healing and acute bruising, but few of the bruises were determined to be acute, and the bruising could have been consistent with being injured during a struggle, a fall to the floor, bumping into things or being bumped into or by being grabbed in an effort to render aid. Whitmarsh had advanced liver cirrhosis, which exacerbates bruising, as does use of alcohol. Her blood alcohol level at the time of death was .24. 8 APP 1197-1209, 1213-14, 1219, 1224-29, 1241; 9 APP 1431-48. The injury on the back of her head was small, about one and a quarter inches, and was acute. 8 APP 1225; 9 APP 1434. The injury to the forehead was acute and was the only facial injury. 8 APP 1225. Whitmarsh's body did not show the extensive bruising that would be expected if Whitmarsh had been beaten constantly for an hour. 9 APP 1439-40. The Effexor metabolite in Whitmarsh's blood could be high if it were her steady state level. 8 APP 1215, 1234. Effexor can increase the risk of suicidal thoughts and attempts, and alcohol can disinhibit a person in suicidal behavior. 9 APP 1479-80. Cirrhosis and alcohol can impair cognition. Id. A medical examiner would want to know about a history of suicide attempts and a history of self-mutilation with knives when weighing the conclusion about the manner of death. 9 APP 1430.

O'Keefe also presented witnesses to show that he had a hope of going back to work the day of the incident, 11 APP 2027-30, and that he and Victoria were living as a couple. She had participated in his union activities and his alcohol treatment program. 9 APP 1316, 1322-23; 11 APP 2050-56.

12-1527

O'Keefe filed proposed jury instructions. 7 APP 1038. The district court refused O'Keefe's request for, *inter alia*, instruction on Involuntary Manslaughter. 12 APP 2033-43, 2072-76; see also 12 app 2191-2218 (Jury Instructions given). O'Keefe then determined not to testify. 12 APP 2081.

O'Keefe moved for a mistrial after closing argument, based upon misconduct including repeated attempts to argue domestic violence as a theory of guilt and a community concern. That motion was denied. 12 APP 2179-2185. The jury deadlocked, and a mistrial was declared on September 2, 2010. 12 APP 2221-32.

III. Facts/Procedural history Third Trial: On September 16, 2010, O'Keefe invoked his rights to a speedy trial, but reserved his right to pursue an extraordinary writ to this Court. 12 APP 2241-42. The district court set trial for January 24, 2011, with a calendar call of January 18. 12 APP 2243-45. The prior trial transcripts were filed on November 23, 2010. O'Keefe considered a writ while he also prepared for retrial.

On January 2, 2011, O'Keefe filed a Motion to Preclude the State from Introducing at Trial Improper Evidence and Argument. 13 APP 2246; see also 14 APP 2371 (Opposition). On January 3, 2011, the State filed a Supplemental Notice of Expert Witnesses stating that it intended to present the testimony of "an expert in battered women's syndrome, power and control dynamics, and the cycle of abuse, generally." 13 APP 2316. On January 6, 2010, the State filed a Motion in Limine to Admit Evidence of Other Bad Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence Pursuant to NRS 48.061. 13 APP 2321; see also 14 APP 2449 (Opposition). On January 7, 2011, O'Keefe filed a Motion to Dismiss on Grounds of Double Jeopardy Bar and Speedy Trial Violation and, alternatively, to Preclude State's New Expert Witness, Evidence and Argument Relating to The Dynamics or Effects of Domestic Violence and Abuse. 13 APP 2344; see also

14 APP 2481 (Opposition). On January 14, the State filed a Supplemental Notice of Witnesses, listing numerous additional witnesses to the new bad acts evidence it sought to introduce. 14 APP 2429.

On January 13, 2011, the district court heard partial argument on O'Keefe's motion to preclude improper evidence and argument. The court granted the motion, in part, and denied the motion, in part, including denying O'Keefe's requests to prevent witness Cheryl Morris from testifying that O'Keefe killed people during military service. 14 APP 2433-42. The Court continued argument on the final issue raised by O'Keefe: That the State should be precluded from arguing or introducing evidence related to domestic violence syndromes and the general cause of fighting against domestic violence. 14 APP 2446-48.

At calendar call on January 18, 2011, the Defense stated that it could not announce ready until the remaining motions were decided, because depending on the district court's rulings, the Defense might seek a stay to pursue a writ to this Court. 14 APP 2540-41. The Defense also stated that its ability to announce ready for trial depended on whether further investigation would be needed, and that if the State were allowed to present new bad acts evidence, further delay would be attributable to the State, affecting O'Keefe's speedy trial rights. 14 APP 2541-43.

On January 20, 2011, the district court heard the remaining motions. The district court refused a stay or a continuance for the Defense to pursue a writ. 14 APP 2547-48. The court denied O'Keefe's Motion to Dismiss, stating that there was no misconduct, and if there was, the court did not see it as intentional. Id. at 2548-52. Defense counsel argued the State's battered woman's syndrome expert should be precluded. Id. at 2552-56. The prosecutor argued that he had a right to explain why Whitmarsh would have stayed with O'Keefe. Id. at 2555-57. The district court ruled, "Well, he's not going to – the expert's not going to say her – her particular state of

prevent retrial, Nevada's jeopardy provision should where, as here, the prosecution has so clearly contravened the spirit of the clause. See Wilson v. State, 123 Nev. 587, 595, 170 P.3d 975, 980 (2007) (providing greater protection in area of resentencing), but see Glover, 125 Nev. at ___ n.5, 220 P.3d at 698 n.5 (stating that this Court has never differentiated between state and federal protection). A defendant need not show prejudice in order to invoke the bar where his trial ends in a mistrial. Arizona v. Washington, 434 U.S. 497, 504 n.15, 98 S. Ct. 824, 830 n.15 (1978). On review, the level of deference given to the trial court's determination on a double jeopardy claim varies, with the strictest scrutiny required where there is reason to believe that the prosecutor is using the superior resources of the State to harass or achieve a tactical advantage over an accused, or the basis for the mistrial is unavailability of evidence and the prosecutor is guilty of inexcusable negligence. Glover, 125 Nev. at ___, 220 P.3d at 684; Washington, 434 U.S. at 508, 98 S. Ct. at 832. Double Jeopardy bars protect

> the "deeply ingrained" principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Yeager v. United States, ___ U.S. ___, 129 S. Ct. 2360, 2365-66 (2009) (quoting Green v. United States, 355 U.S. 184, 187-188, 78 S. Ct. 221 (1957)); Washington, 434 U.S. at 504 n.14, 98 S. Ct. at 829 n.14.

Therefore, the Double Jeopardy bar "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence it failed to muster in the first proceeding." Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 2147 (1978). This rule lies "at the core of the Clause's protections" and "prevents the State from honing its trial strategies and

mind is generally this is what the dynamics of this – of a domestic violence relationship entails. So he can't – is not going to be allowed to say this is what she was thinking in this case." When O'Keefe's counsel questioned the relevance of the evidence, the court responded that "there's absolutely no case law, statutory law, that provides that on a second trial, third trial, fourth trial the . . . State or defense can't notice new witnesses, can't notice new experts as long as they're noticed timely." The court then found that the State's notice was timely and indicated it would address the substantive claim later. 14 APP 2559. The court found no Speedy Trial violation. Id. at 2559-64.

On the afternoon of January 20, 2011, the district court heard the State's Motion to Admit Evidence of Other Bad Acts. The parties stated their positions regarding discovery, and the Defense objected to the fact that 300 pages of new discovery was provided on January 19, 2010, and it had no opportunity to prepare to meet this evidence. 14 APP 2569-70. The parties argued whether the new bad act evidence and expert testimony were permissible. 14 APP 2572-78. The district court ruled that the two guilty pleas to domestic battery and a jury verdict were admissible; the remaining acts might also be admissible. Id. at 2582-84. The court then determined to continue the matter for a Petrocelli hearing and reset trial, based on the Defense's inability to be ready for trial the following Monday, i.e., the 24th, given the decision to admit new bad acts evidence. Id. at 2585-86.

ARGUMENT

I. DOUBLE JEOPARDY BARS PREVENT RETRIAL

The Double Jeopardy Clauses of the United States and Nevada Constitutions may entitle a defendant who is put to trial to go free if the trial fails to end in a final judgment. See Glover v. District Court, 125 Nev. ___, ___, 220 P.3d 684, 692 (2009); U.S. Const. amend. V, XIV; Nev. Const. art. 1, § 8. O'Keefe submits even if the federal provision is inadequate to

perfecting its evidence through successive trials." Tibbs v. Florida, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218 (1982); Johnson v. Estelle, 506 F. 2d 347, 352 (5th Cir. 1975) ("We cannot permit initial trial deficiencies to be cured by subsequent trials.") To allow the State another opportunity to produce evidence that it failed to muster at the original proceedings runs counter to Double Jeopardy principles. State v. Biegenwald, 524 A.2d 130, 150 (N.J. 1987).

It is appropriate for both parties to revisit prior rulings and strategy following reversal of a conviction for legal error and where a verdict is against the weight of the evidence (as opposed to based on insufficient evidence). Tibbs, 457 U.S. 31, 43 n.19, 102 S. Ct. 2211, 2219 n.19 (1982); United States v. Shotwell Manufacturing Co. 355 U.S. 233, 243, 78 S. Ct. 245, 252 (1957); State v. Hennessy, 29 Nev. 320, 341, 90 P. 221, 226 (1907); United States v. Gallagher, 602 F.2d 1139, 1143 (3rd Cir. 1979). However, a mistrial should not be permitted to operate as a post-jeopardy continuance to allow the prosecution to strengthen its case. United States v. Wilson, 534 F.2d 76, 80 (8th Cir. 1976). Thus, retrial is prohibited where a prosecutor intentionally commits misconduct for the purpose of a tactical advantage, such as using an aborted proceeding as a trial run for the next. Washington, 434 U.S. at 508, 98 S. Ct. at 832.

In Ohio v. Betts, 2007 Ohio App. Lexis 4873 (2007), 14 APP 2588, the same rare factual scenario as the instant case was presented, i.e., "the somewhat unusual backdrop of potential double jeopardy implications following the *denial* of the motion for mistrial and the case is then retried following a hung jury." Id. at 10. The court concluded that prosecutorial misconduct will bar a subsequent retrial where the prosecutor acted with the specific intent either to inspire a motion for a mistrial or to obtain a conviction where an acquittal was likely. Id. at 10-11. Courts apply objective factors to determine whether the governmental conduct was done

with improper intent. Oregon v. Kennedy, 456 U.S. 667, 675, 102 S. Ct. 2083, 2089 (1982). For instance, in United States v. Lun, 944 F.2d 642, 644-46 (9th Cir. 1991), the Ninth Circuit Court of Appeals considered: (1) whether the government's case was going badly, causing the prosecutor to fear acquittal and affirmatively seek a mistrial; (2) whether the government would gain from a second trial; and (3) whether the government committed repeated acts of misconduct. Applying these factors here demonstrates that the district court erred in denying O'Keefe relief on his Double Jeopardy claim.

(1) The government's case was going badly.

This Court had previously recognized there was not overwhelming evidence of a Second-Degree Murder. 5 APP 737-38. At the retrial, prosecution fought the giving of a lesser included instruction on Involuntary Manslaughter though one was given at the first trial. 12 APP 2072-76. None of the experts at retrial could rule out suicide or accident based on the physical evidence. The evidence showed possible innocent explanations for Whitmarah's bruising, her physical condition and alcohol use, combined with the circumstances of O'Keefe's arrest and his attempts to render aid by lifting her body. There was no evidence of any sort of domestic dispute in the days before the incident. See 9 APP 1343, 1349 (the downstairs neighbor testified there had never been noise in O'Keefe's apartment before). No witness saw any domestic dispute or battery occurring. The responding officer witnesses gave conflicting testimony, and the good faith of police investigation and motives of Cheryl Morris were challenged. 9 APP 1297-1305, 1308-11; 11 APP 2006, 2008. The prosecution's theory that O'Keefe mistreated women as indicated by his treatment of the female homicide detective was a strained but improper attempt to convict O'Keefe based upon conformity with a character trait. 11 APP 1967, 1973-74, 1988-94.

The jury hung at the retrial, even with the improper introduction of other bad acts evidence depicting O'Keefe as a killer and the improper argument by the State.

(2) The prosecution saw advantage in a successive trial.

Strong evidence of the prosecutor's intent came after trial with the flurry of pretrial motions seeking to admit new evidence. The prosecution obviously perceived advantages from a third trial: the ability to admit new evidence on domestic violence that was unavailable at the second trial. The State failed to notice the expert in Battered Women's Syndrome within the time to present this expert during the prior trial. See NRS 174.234(2) (requiring 21 days' notice). The rulings on the bad act issues were settled, 2 APP 1-16, and the State had not timely noticed or provided full discovery for the new bad act evidence.

(3) The prosecution committed repeated acts of misconduct.

The prosecution's repeated misconduct substantially reduced the probability of acquittal and created an unacceptable risk of biased jury deliberations. See Kennedy, 456 U.S. at 690, 102 S. Ct. at 2097 (Stevens, J., concurring) (jeopardy bar is appropriate where prosecutorial error substantially reduced the probability of acquittal); Glover, 125 Nev. at ___, 220 P.3d at 692 (improper advocacy that places prejudicial and inadmissible evidence before the jury can create an unacceptable risk of biased jury deliberations and require a mistrial).

A. Improper argument re domestic abuse

Despite the prior rulings of the court, and the understandings of the parties, during the 2010 retrial, the State repeatedly introduced the issue of battered women's syndrome as a theory of guilt and a community cause. During voir dire, the Court ruled that the State could not discuss domestic violence syndromes or define that term. 7 APP 1111-13.

12-152

In his opening statement, the prosecutor stated, *"An anonymous domestic violence survivor once made this observation. If you can't be thankful for what you have, be thankful for what you have escaped. Well, unfortunately Victoria was not able to escape from the defendant . . . ."* 8 APP 1166-67. In rebuttal closing argument, the prosecutor argued,

> *It was Ralph Waldo Emerson who said all violence, all that is dreary, all that repels is not power. It is the absence of power. In battering Victoria in the hours leading up or the minutes leading up to her ultimate death, the defendant didn't show us what kind of power he has. He showed us how weak he is. Men who beat women.*

12 APP 2148. The prosecution argued a theme that O'Keefe was a misogynist or a sexist who mistreated women. Id. at 2149. The prosecutor also made reference to Whitmarsh's bruising *in various stages of healing* and argued that this proved malice in that she *"had been roughly handled in an ongoing bashing."* A defense objection to this argument was sustained. 12 APP 2171-72. The prosecutor further argued, *"Mary Gianocos who is the director of Voices against Violence once said. . . everything we know . . . ."* A defense objection to this argument was sustained. 12 APP 2177. The prosecutor continued, *"Everything we know about domestic violence is that it is about power and controlling people. Fortunately, the defendant is no longer in control."* Id. At the conclusion of argument, the Defense made a motion for a mistrial based, in part, on these arguments. The district court concluded that any errors did not warrant a mistrial. 8/31/10 TT 163-69.

It was misconduct for the prosecutor to appeal to the conscience of the community or societal concerns because the jurors' only proper focus should have been on whether the State proved its charge. See Atkins v. State, 112 Nev. 1122, 1138, 923 P.2d 1119 (1996) (Rose, J., concurring), overruled on other grounds, Beriano v. State, 122 Nev. 1066, 1076, 146 P.3d 265 (2006). The prosecutor committed misconduct by intentionally referring to and

12-15271

arguing facts outside the record. Cf. Glover, 125 Nev. at ___, 220 P.3d at 696 (mistrial was necessary because the *defense* argued facts not in evidence). The improper argument relying regarding domestic violence was extremely prejudicial in light of the fact that the Defense had limited O'Keefe's evidence of a loving relationship and good character so as not to open the door to bad acts evidence, 2 APP 2-13; 8 APP 1246-50; 9 APP 1268-79, and had been denied the opportunity to explain Whitmarsh's actual psychiatric diagnoses. Further, no evidence was admissible for the purpose of showing that O'Keefe acted in conformity with the character traits of an abuser or that Whitmarsh acted in conformity with the character traits of a victim.

Moreover, the evidence did not conform to the charging document. Once jeopardy had attached and O'Keefe had testified, it was extremely unfair and a violation of due process for the State to argue an unlawful act (ongoing domestic violence) theory not charged in the information. This conduct was in defiance of this Court's previous determination that permitting the jury to consider an unnoticed unlawful act theory violated O'Keefe's Due Process rights because "the State's charging document did not allege that O'Keefe killed the victim while he was committing an unlawful act and the evidence presented at trial did not support this theory of second-degree murder." 5 APP 737-38. See also Jennings v. State, 116 Nev. 488, 998 P.2d 557 (2000).

B. Improper introduction of bad acts

During the August 2010 retrial, without seeking permission, the State elicited through questioning of Morris that O'Keefe had killed people before during his military service. This evidence was irrelevant and inadmissible character evidence. See NRS 48.015; NRS 48.025(2); NRS 48.035; Roever v. State, 114 Nev. 867, 871-72, 963 P.2d 503, 505-06 (1998). The evidence was

extremely inflammatory as it depicts O'Keefe as an actual killer. The district court denied O'Keefe's motion to preclude this evidence at any future trial. 14 APP 2433-42.

C. Misconduct at original trial

The prosecution has now committed intentional misconduct at successive trials. Although this Court declined to rule on the issue during O'Keefe's direct appeal from the first conviction, in his original trial, the prosecution elicited testimony from a transportation officer that O'Keefe told him to "turn that nigger music off" and said "I don't listen to nigger music." 3 APP 420 (Tr. 179), 422 (Tr. 188). The Defense requested a mistrial, which the district court denied. 3 APP 439-40. This denied O'Keefe his constitutional rights. See Moore v. Morton, 255 F.3d 95, 114 (3rd Cir. 2001); NRS 48.045; Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001)).

In sum, the district court failed to give due weight to the objective evidence of the prosecution's prohibited intent. The prosecution proceeded to retrial aware that it could not use certain evidence. If it had not tried to do so improperly, but had simply stopped the trial for lack of this evidence, a third trial would have been barred by the Double Jeopardy Clause. See Washington, 434 U.S. at 508, 98 S. Ct. at 832 ("If . . . a prosecutor proceeds to trial aware that key witnesses are not available to give testimony and a mistrial is later granted for that reason, a second prosecution is barred."); Hylton v. District Court, 103 Nev. 418, 426, 743 P.2d 622, 627 (1987) (retrial barred where prosecutor was guilty of inexcusable negligence). The prosecution should not be rewarded for its misconduct, which tainted the jury, by receiving another chance to hone its trial strategies and to put forth evidence it had previouly affirmatively abandoned.

II. DUE PROCESS AND SPEEDY TRIAL PROVISIONS BAR RETRIAL

The district court erred in prejudicing O'Keefe's speedy trial rights by accommodating the State's desire to revamp its case with new evidence. O'Keefe has suffered multiple trials, having to undergo the stress and anxiety attendant thereto and a lengthy pretrial detention since his arrest on November 6, 2008. The district court's rulings allowing the State's new evidence necessitated further delay in violation of O'Keefe's rights to due process and a speedy trial. U.S. Const. amend. VI, XIV; Nev. Const., art. 1, sec. 8; NRS 178.556(1). NRS 178.556(1) provides for a trial within 60 days after the arraignment on an Information and after a mistrial. Rodriguez v. State, 91 Nev. 782, 542 P.2d 1065 (1975). Dismissal for the failure to bring a defendant to trial within 60 days is mandatory if there is no good cause shown for the delay. Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970). The State has the burden of showing good cause for delay. Id. An accused is not required to show that he was prejudiced by the failure to bring him to trial within 60 days. State v. Craig, 87 Nev. 199, 484 P.2d 719 (1971).

O'Keefe was arraigned on January 20, 2009, and invoked his right to a speedy trial. He at all times thereafter asserted his speedy trial rights. Even assuming the district court's calendar constitutes good cause for the January 24, 2011 trial setting after the mistrial was declared on September 2, 2010, there was no good cause for the further delay caused by re-determining the law of the case to allow new evidence for which inadequate discovery had been provided until after calendar call.

The Defense was diligent in seeking discovery, filing a formal discovery motion, 6 APP 817, and conducting multiple reviews of the District Attorney's open file. The prosecution was aware of the additional other bad

acts by February, 2009. See 1 APP 7-22. However, the State failed to provide O'Keefe with more than simple incident reports, see 14 APP 2449-80, until after the January 18, 2011 calendar call, when it provided the additional 300 plus pages of discovery regarding the numerous prior criminal offenses and cases, which included statutory discovery such as witness statements. O'Keefe was entitled to this discovery. NRS 174.235; U.S. Const. amend V, XIV; Nev. Const. art. 1, sec. 8; Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000); U.S. Const., amend. V, XIV. The failure of the State to timely provide the discovery impaired his ability to mount a defense for trial. O'Keefe's request for time to pursue a writ to this Court was denied. A much lengthier delay, however, was necessary to meet the State's new evidence. The Defense must now investigate new witnesses and records. Further, the Defense must change its entire strategy and secure the testimony of good character witnesses that it previously forwent based upon the settled rulings in the case, the prosecution's representation that it would not seek to admit the bad act evidence, and the Defense's desire not to open the door to the evidence. Finally, the Defense will likely need to re-litigate previously settled issues which relied on the previous bad acts rulings, i.e., O'Keefe's motions to suppress his statements and admit evidence of Whitmarsh's psychological history. See 6 APP 826; 7 APP 996-1033. The State's lack of diligence should have barred the district court from granting its request to admit the new evidence.

The district court also acted arbitrarily in accommodating the State's desire to present new evidence. Cf. Bennett v. District Court, 121 Nev. ___, 121 P.3d 605, 610 (2005) (due process prevents the State from alleging new aggravators during a retrial of capital penalty phase where the State had chosen to forego these aggravators during the notice period); Browning v. State, 124 Nev. ___, 188 P.3d 60, 74 (2008) (assuming without deciding that

the State might be prevented from presenting new penalty hearing evidence at a second penalty trial, but concluding that minimal additional evidence was actually introduced). The district court also favored the State in both the matter of a stay/continuance and whether any timing issue barred evidence. When the Defense sought to admit expert testimony and evidence regarding Whitmarsh's actual diagnoses, the prosecutor argued, "*I mean, now what we're going to do is we're going to have a – a shrink come in, I guess, and analyze someone who's dead after the fact.*" The Court responded, "*Well, we're not having it at this point.*" 7 APP 990. However, the district court ignored timing when the State sought to introduce evidence to support its theories regarding the psychological traits of Whitmarsh and O'Keefe.

Contrary to the State's assertions, the new evidence which the State seeks to admit is not made admissible by NRS 48.061. Subsection 2 of that statute provides, "*Expert testimony concerning the effect of domestic violence may not be offered against a defendant pursuant to subsection 1 to prove the occurrence of an act which forms the basis of a criminal charge against the defendant.*" (Emphasis added.) This language demonstrates that the State's reliance on the dynamics of abusive relationships to prove its case is improper. The State relied on the 2001 amendments to NRS 48.061, see 2001 Nev. Stat., ch. 360, at 1699, allowing the presentation evidence of domestic violence and its effects and limiting expert testimony. However, there is no exception in Nevada to the usual presumption against admitting such evidence under NRS 48.045. By the 2001 amendments, the Legislature sought only to remedy the problem of testifying but recanting victim and not to create an exception to the usual presumption against character evidence. See Minutes of Hearing on AB 417 Before the Assembly Comm. on Judiciary, 71st Leg. (Nev., April 5, 2001); Minutes of Hearing on AB 417 Before the Senate Comm. on Judiciary, 71st Leg. (Nev., May 16, 2001).

12-1527

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN K. O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA
Respondent.

Supreme Court No.:
District Court Case No.: 08C250630

APPELLANT'S APPENDIX – VOLUME XXVII – PAGES 5200-5399

MATTHEW D. CARLING
51 East 400 North, Bldg. #1
Cedar City, Utah 84720
(702) 419-7330 (Office)
Attorney for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
Counsel for Respondent

CATHERINE CORTEZ MASTO
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Counsel for Respondent

INDEX
O'Keefe, Brian

Certificate of Service filed on 06/29/15	5454
Clerks Certificate Judgment Reversed and Remanded filed on 05/06/10	1023-1027
Criminal Bindover filed on 12/26/08	0004-0020
Criminal Order to Statistically Close Case filed on 07/31/13	4662
Defendant O'Keefe's Opposition to Motion in Limine to Admit Evidence of Other Bad Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence Pursuant to 48.061 filed on 01/18/11	2877-2907
Defendant's Brief on Admissibility of Evidence of Alleged Victim's History of Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation (With Knives andn Scissors), and Erratic Behavior filed on 03/20/09	0293-0301
Defendant's Motion to Require Court to Advise the Prosepective Jurors as to the Mandatory Sentences Required if the Defendant is Convicted of Second Degree Murder filed on 03/04/09	0196-0218
Defendant's Motion to Settle Record filed on 03/24/09	0317-0322
Defendant's Proposed Jury Instructions filed on 03/20/09	0302-0316
Defendant's Proposed Jury Instructions filed on 08/23/10	1335-1393
Defendant's Submission to Clark County District Attorney's Death Review Committee filed on 12/31/08	0021-0027
Defendant's Supplemental Proposed Jury Instructions filed on 03/20/09	0290-0292
Defendant's Supplemental Notice of Witnesses filed on 08/16/10	1294-1296
District Court Amended Jury List filed on 03/19/09	0245
District Court Jury List filed on 03/16/09	0239
Ex Parte and/or Notice of Motion and Motion to Chief Judge to Reassign Case to Jurist of Reason Based on Pending Suit 3:14-CV-00385-RCJ-WGC Against Judge Michael Villani for proceeding in Clear "Want of Jurisdiction" Thereby Losing Immunity, Absolutely filed on 08/28/14	4903-4912
Ex Parte and/or Notice of Motion filed on 08/28/14	4913
Ex Parte Application for Order Requiring Material Witness to Post Bail filed on 03/10/09	0232-0236
Ex Parte Motion for an Order Shortening Time filed on 08/16/10	1292-1293
Ex Parte Motion for Appointment of Counsel Pursuant to NRS 34.750 filed on 09/15/14	4950-4952
Ex Parte Motion for Defense Costs filed on 06/30/10	1037-1043
Ex Parte Motion for Production of Documents (Specific) Papers, Pleadings and Tangible Property of Defendant filed on 01/13/14	4714-4720
Ex Parte Motion for Reimbursement of Legal Cost of Faretta Canvassea Defendant to Above Instant Case filed on 12/13/13	4701-4707
Ex Parte Motion for Release of Medical Records filed on 04/08/11	3041-3042
Ex Parte Motion to Extend Prison Copywork Limit filed on 06/24/15	5438-5441
Exhibits to Petition for Writ of Habeas Corpus by a True Pretrial Detainee filed on 09/15/14	4954-4980
Ex-Parte Motion for Reimbursement of Incidental Costs Subsequent the Court Declaring Defendant Indigent and Granting Forma Pauperis filed on 01/21/14	4722-4747

Ex-Parte Motion to Extend Prison Copywork Limit filed on 01/28/14	4764-4767
Filing in Support of Motion to Seal Records as Ordered by Judge filed on 04/19/12	3438-3441
Findings of Fact, Conclusion of Law and Order filed on 10/02/15	5528-5536
Information filed on 12/19/08	0001-0003
Instructions to the Jury (Instruction No. 1) filed on 09/02/10	1399-1426
Instructions to the Jury filed on 03/20/09	0246-0288
Judgment of Conviction (Jury Trial) filed on 09/05/12	4623-4624
Judgment of Conviction filed on 05/08/09	0327-0328
Judicial Notice Pursuant NRS 47.140(1)-NRS 47.150(2) Supporting Pro-Se Petition Pursuant NRS 34.360 filed on 03/12/15	5082-5088
Jury List filed on 06/12/12	3456
Jury List filed on 08/25/10	1396
Letters in Aid of Sentencing filed on 05/04/09	0324-0326
Motion by Defendant O'Keefe filed on 08/19/10	1329-1334
Motion for Complete Rough Draft Transcript filed on 04/03/12	3430
Motion for Judicial Notice the State's Failure to File and Serve Response in Opposition filed on 02/24/14	4800-4809
Motion for Judicial Ruling filed on 05/24/10	1028-1030
Motion for Leave to File Supplemental Petition Addressing All Claims in the First Instance Required by Statute for Judicial Economy with Affidavit filed on 06/15/15	5420-5422
Motion for Relief from Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals has not Issued any Remand, Mandate, or Remittitur filed on 07/23/14	4871-4889
Motion to Continue Trial filed on 06/01/12	3450-3455
Motion to Dismiss Counsel filed on 10/03/11	3164-3168
Motion to Modify and/or Correct Illegal Sentence filed on 01/27/14	4749-4759
Motion to Place on Calendar filed on 10/26/11	3169-3182
Motion to Place on Calendar filed on 11/28/11	3184-3192
Motion to Withdraw as Counsel filed on 04/29/11	3044-3047
Motion to Withdraw Counsel filed on 11/28/11	3193-3198
Motion to Withdraw Counsel for Conflict and Failure to Present Claims when I.A.C. Claims Must be Raised Per Statute in the First Petition Pursuant Chapter 34 filed on 06/08/15	5148-5153
Motion to Withdraw filed on 09/14/10	1434-1437
Notice of Appeal filed on 03/13/14	4843-4849
Notice of Appeal filed on 04/11/14	4858-4861
Notice of Appeal filed on 05/21/09	0332-0333
Notice of Appeal filed on 07/31/15	5467-5472
Notice of Appeal filed on 08/11/15	5478-5483
Notice of Appeal filed on 08/29/14	4923-4924
Notice of Appeal filed on 10/21/15	5552-5553
Notice of Appeal filed on 11/03/15	5569-5571

Notice of Appeal filed on 11/21/14	5067-5069
Notice of Change of Address filed on 06/06/14	4864-4865
Notice of Defendant's Expert Witness filed on 02/20/09	0180-0195
Notice of Defendant's Witnesses filed on 03/06/09	0224-0227
Notice of Entry of Findings of Fact, Conclusion of Law and Order filed on 10/06/15	5537-5546
Notice of Expert Witnesses filed on 03/05/09	0222-0223
Notice of Motion and Motion by Defendant O'Keefe for a Reasonable Bail filed on 09/24/10	1441-1451
Notice of Motion and Motion by Defendant O'Keefe for Discovery filed on 08/02/10	1211-1219
Notice of Motion and Motion by Defendant O'Keefe for Evidentiary Hearing on Whether the State and CCDC have Complied with Their Obligations with Respect to the Recording of a Jail Visit Between O'Keefe and State Witness Cheryl Morris filed on 08/02/10	1220-1239
Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, Including Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation and Erratic Behavior filed on 07/21/10	1064-1081
Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, Including Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation and Erratic Behavior filed on 07/21/10	1099-1116
Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Showing LVMPD Homicide Detectives Have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/02/10	1199-1210
Notice of Motion and Motion by Defendant O'Keefe to Dismiss on Grounds of Double Jeopardy Bar and Speedy Trial Violation and, Alternatively, to Preclude State's New Expert Witness, Evidence and Argument Relating to the Dynamics or Effects of Domestic Violence and Abuse filed on 01/07/11	2785-2811
Notice of Motion and Motion by Defendant O'Keefe to Preclude Expert Testimony filed on 08/16/10	1284-1291
Notice of Motion and Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 07/21/10	1047-1063
Notice of Motion and Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 07/21/10	1082-1098
Notice of Motion and Motion by defendant O'Keefe to Preclude the State from Introducing at Trial Improper Evidence and Argument filed on 01/03/11	1682-2755
Notice of Motion and motion by Defendant O'Keefe to Suppress his	

Statements to Police, or, Alternatively, to Preclude the State from Introducing Portions of his Interrogation filed on 08/02/10	1152-1198
Notice of Motion and Motion for Leave of Court to File Motion for Rehearing – Pursuant to EDCR. Rule 2.24 filed on 08/29/14	4914-4921
Notice of Motion and Motion in Limine to Admit Evidence of Other Bad Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence Pursuant to 48.061 filed on 01/06/11	2762-2784
Notice of Motion and Motion to Admit Evidence of Other Crimes filed on 02/02/09	0150-0165
Notice of Motion and Motion to Admit Evidence of Polygraph Examination Results filed on 03/29/12	3412-3415
Notice of Motion and Motion to Dismiss based Upon Violation(s) of the Fifth Amendment Component of the Double Jeopardy Clause, Constitutional Collateral Estoppel and, Alternatively, Claiming Res Judicata, Enforceable by the Fourteenth Amendment Upon the States Precluding State's Theory of Prosecution by Unlawful Intentional Stabbing with Knife, the Alleged Battery Act Described in the Amended Information filed on 03/16/12	3201-3224
Notice of Motion and Motion to Seal Records filed on 03/22/12	3416-3429
Notice of Motion and Motion to Waive Filing Fees for Petition for Writ of Mandamus filed on 12/06/13	4695-4697
Notice of Motion and Motion to Withdraw as Attorney of Record filed on 09/23/15	5517-5519
Notice of Motion and Motion to Withdraw as Attorney of Record filed on 09/29/15	5525-5527
Notice of Motion filed on 01/13/14	4721
Notice of Motion filed on 01/21/14	4748
Notice of Motion filed on 01/27/14	4760
Notice of Motion filed on 02/24/14	4810
Notice of Motion filed on 03/04/14	4833
Notice of Motion filed on 06/08/15	5154-5160
Notice of Motion filed on 07/23/14	4890
Notice of Motion filed on 08/29/14	4922
Notice of Motion filed on 09/15/14	4953
Notice of Witness and/or Expert Witnesses filed on 02/03/09	0166-0167
Notice of Witnesses and/or Expert Witnesses filed on 02/17/09	0178-0179
NV Supreme Court Clerks Certificate/ Judgment Affirmed filed on 02/06/15	5072-5081
NV Supreme Court Clerks Certificate/Judgment Affirmed filed on 07/26/13	4653-4661
NV Supreme Court Clerks Certificate/Judgment Dismissed filed on 06/18/14	4866-4870
NV Supreme Court Clerks Certificate/Judgment Dismissed filed on 03/12/15	5089-5093
NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	

09/28/15	5520-5524
NV Supreme Court Clerks Certificate/Judgment Dismissed filed on 10/29/14	5062-5066
O'Keefe's Reply to State's Opposition to Motion to Admit Evidence Showing LVMPD Homicide Detectives have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/13/10	1256-1265
Opposition to State's Motion to Admit Evidence of Other Bad Acts filed on 02/06/09	0169-0172
Order Authorizing Contact Visit filed on 03/04/09	0219-0220
Order Authorizing Contact Visit filed on 08/12/10	1253-1254
Order Denying Defendant's Ex Parte Motion to Extend Prison Copywork Limit filed on 08/13/15	5486-5488
Order Denying Defendant's Ex-Parte Motion for Reimbursement of Incidental Costs Declaring Defendant Ingigent and Granting Forma pauperis filed on 03/11/14	4840-4842
Order Denying Defendant's Motion for Relief From Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals had not Issues any Remand, Mandare or Remittatture filed on 09/04/14	4927-4929
Order Denying Defendant's Motion to Dismiss filed on 04/11/12	3434-3435
Order Denying Defendant's Motion to Seal Recoreds and Defendant's Motion to Admit Evidence of Plygraph Examination filed on 05/24/12	3448-3449
Order Denying Defendant's Petition for Writ of Mandamus or in the Alternative Writ of Coram Nobis; Order Denying Defendant's Motion to Waive Filing Fees for Petition for Writ of Mandamus; Order Denying Defendant's Motion to Appoint Counsel filed on 01/28/14	4761-4763
Order Denying Defendant's Pro Per Motion for Judifical Notice- The State's Failure to File and Serve Response in Opposition filed on 04/01/14	4855-4857
Order Denying Defendant's Pro Per Motion for Leave to File Supplemental Petition Addressing all Claims in the First Instance Required by Statute for Judicial Economy with Affidavit filed on 07/15/15	5464-5466
Order Denying Defendant's Pro Per Motion to Modify and/or Correct Illegal Sentence filed on03/25/14	4852-4854
Order Denying Defendant's Pro Per Motion to Withdraw Counsel for Conflict and Failure to Present Claims When I.A.C. Claims Must be Raised Per Statute in the First Petition Pursuant to Chapter 34 filed on 07/15/15	5461-5463
Order Denying Matthew D. Carling's Motion to Withdraw as Attorney of Record for Defendant filed on 11/19/15	5574-5575
Order Denying Motion to Disqualify filed on 10/06/14	5037-5040
Order filed on 01/30/09	0149
Order filed on 11/06/10	1462-1463
Order for Petition for Writ of Habeas Corpus filed on 10/15/14	5051
Order for Production of Inmate Brian O'Keefe filed on 05/26/10	1032-1033
Order for Return of Fees filed on 11/10/11	3183

Order for Transcripts filed on 04/30/12	3442
Order Granting and Denying in Part Defendant's Ex-Parte Motion for Production of Documents (Specific) Papers, Pleadings, and Tangible Property of Defendant filed on 02/28/14	4818-4820
Order Granting Ex parte Motion for Defense Costs filed on 07/01/10	1044-1045
Order Granting Request for Transcripts filed on 01/20/11	2966-2967
Order Granting Request for Transcripts filed on 04/27/11	3043
Order Granting Request for Transcripts filed on 09/14/10	1430-1431
Order Granting Request for Transcripts filed on 09/16/10	1438-1439
Order Granting, in Part, and Denying, in Part, Motion by Defendant O'Keefe for Discovery filed on 08/23/10	1394-1395
Order Granting, in Part, and Denying, in Part, Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 09/09/10	1427-1429
Order Granting, in Part, the State's Motion to Admit Evidence of Other Bad Acts filed on 03/13/12	3199-3200
Order Releasing Medical Records filed on 04/08/11	3039-3040
Order Requiring Material Witness to Post Bail or be Committed to Custody filed on 03/10/09	0230-0231
Order Shortening Time filed on 08/16/10	1283
Petition for a Writ of Mandamus or in the Alternative Writ of Coram Nobis filed on 12/06/13	4663-4694
Petition for Writ of Habeas Corpus or in the Alternative Motion to Preclude Prosecution from Seeking First Degree Murder Conviction Based Upon the Failure to Collect Evidence filed on 01/26/09	0125-0133
Petition for Writ of Habeas Corpus Pursuant to NRS 34.360 Exclusive 1 Based On Subject-Matter of Amended Information Vested in Ninth Circuit by notice of Appeal Then "COA" Granted on a Double Jeopardy Violation with No Remand Issued Since filed on 09/15/14	4940-4949
Petitioner's Supplement with Exhibit of Oral Argument Scheduled by the Ninth Circuit Court of Appeals for November 17, 2014, Courtroom #1 filed on 10/01/14	4984-4988
Pro Se "Reply to State's Opposition to Defendant's Pro Se Motion to Modify and/or Correct Illegal Sentence filed on 03/04/14	4821-4832
ProSe "Reply" to State's Opposition to Defendant's (Ex-Parte) "Motion for Reimbursement of Incidental Costs Subsequent the Courts Declaring Defendant Indigent and Granting Forma Pauperis" filed on 02/24/14	4792-4799
Receipt of Copy filed on 01/03/11	2761
Receipt of Copy filed on 01/12/11	2812
Receipt of Copy filed on 01/12/11	2813
Receipt of Copy filed on 01/18/11	2876
Receipt of Copy filed on 01/27/09	0134
Receipt of Copy filed on 01/30/09	0146
Receipt of Copy filed on 02/06/09	0168

Receipt of Copy filed on 03/04/09	0221
Receipt of Copy filed on 03/24/09	0323
Receipt of Copy filed on 05/24/10	1031
Receipt of Copy filed on 06/13/11	3163
Receipt of Copy filed on 06/30/10	1036
Receipt of Copy filed on 08/02/10	1240
Receipt of Copy filed on 08/02/10	1241
Receipt of Copy filed on 08/02/10	1242
Receipt of Copy filed on 08/02/10	1243
Receipt of copy filed on 08/13/10	1255
Receipt of Copy filed on 09/14/10	1432
Receipt of Copy filed on 09/17/10	1433
Receipt of Copy filed on 09/21/10	1440
Receipt of File filed on 07/01/10	1046
Reply in Support of Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) filed on 08/25/15	5500-5510
Reply to State's Response to Defendant's Pro Per Post-Conviction Petition for Habeas Corpus filed on 06/16/15	5423-5432
Reply to State's Response to Defendant's Supplemental Petition for Writ of Habeas Corpus filed on 08/24/15	5489-5499
Reqeust for Rough Draft Transcripts filed on 10/21/15	5549-5551
Request for Rough Draft Transcripts filed on 07/17/12	3458-3460
Request for Certified Transcript of Proceeding filed on 09/09/09	0772-0723
Request for Rough Draft Transcript filed on 05/21/09	0329-0331
Request for Rough Draft Transcripts filed on 11/20/12	4629-4631
Return to Writ of Habeas Corpus filed on 01/29/09	0135-0145
Second Amended Information filed on 08/19/10	1326-1328
State's Opposition to Defendant's (Ex-Parte) "Motion for Reimbursement of Incidental Costs Subsequent the Courts Declaring Defendant Indigent and Granting Forma Pauperis" filed on 02/07/14	4768-4791
State's Opposition to Defendant's Motion for a Reasonable Bail filed on 09/27/10	1452-1461
State's Opposition to Defendant's Motion for Judicial Notice – The State's Failure to File and Serve the Response in Opposition filed on 03/10/14	4834-4839
State's Opposition to Defendant's Motion to Dismiss filed on 03/21/12	3407-3411
State's Opposition to Defendant's Motion to Preclude the State from Introducing at Trial Improper Evidence and Argument filed on 01/12/11	2814-2871
State's Opposition to Defendant's Motion to Seal Records filed on 04/05/12	3431-3433
State's Opposition to Defendant's Motion to Suppress his Statements to Police, or, Alternatively, to Preclude the State from Introducing Portions of his Interrogation filed on 08/17/10	1306-1319
State's Opposition to Defendant's Motion to Withdraw Counsel for Conflict and Failure to Present Claims When I.A.C. Claims Must be	

Raised Per Statute in the First Petition Pursuant to Chapter 34 filed on 06/25/15	5442-5446
State's Opposition to Defendant's Pro Per Motion for Leave of Court to File Motion. . .Rule 2.4 filed on 09/12/14	4935-4939
State's Opposition to Defendant's Pro Per Motion to Chief Judge to Reassign Case to Jurist of Reason Based on Pending Suit Against Judge Michael Villani for Proceeding in Clear "Want of Jurisdiction" Thereby Losing Immunity, Absolutely filed on 09/12/14	4930-4934
State's Opposition to Defendant's Pro Per Motion to Modify and/or Correct Illegal Sentence filed on 02/24/14	4811-4817
State's Opposition to Motion for Evidentiary Hearing on Whether the State and CCDC have Complied with their Obligations with Respect to the Recording of a Jail Visit Between O'Keefe and State Witness Cheryl Morris filed on 08/10/10	1244-1247
State's Opposition to Motion to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, Including Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation and Erratic Behavior filed on 08/16/10	1277-1282
State's Opposition to Motion to Admit Evidence Showing LVMPD Homicide Detectives Have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/10/10	1248-1252
State's Opposition to Motion to Dismiss and, Alternatively, to Preclude Expert and Argument Regarding Domestic Violence filed on 01/18/11	2908-2965
State's Opposition to Motion to Preclude Expert Testimony filed on 08/18/10	1320-1325
State's Response and Motion to Dismiss Defendant's Motion for Relief from Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals had not Issued any Remand, Mandare or Remittatture of filed on 08/07/14	4891-4902
State's Response and Motion to Dismiss to Defendant's Pro Per Petition for Writ of Habeas Corpus Pursuant to NRS 34.360 Exclusive based on Subject-Matter of Amended Information Vested in Ninth Circuit by Notice of Appeal Then "COA" Granted on a Double jEopardy Violatio with No Remand Issued Since (Post Conviction), Amended Peition and Accompany Exhibits, Opposition to Request for Evidentiary Hearing, and Opposition to Pro Per Motion to Appoint Counsel filed on 10/10/14	5041-5050
State's Response to Defendant's Motion to Preclude the State from Introducint at Trial Other Bad Acts or Character Evidence and Other Evidence that is Unfairly Prejudicial or Would Violate his Contitutionsal Rights filed on 08/16/10	1268-1276
State's Response to Defendant's Petition for a Writ of Mandamus or in the Alternative Writ of Coram and Response to Motion to Appoint Counsel filed on 12/31/13	4708-4713
State's Response to Defendant's Pro Per Post-Conviction Petition for Writ of Habeas Corpus filed on 06/02/15	5145-5147
State's Response to Defendant's Pro Per Supplemental Petition for Writ	

of Habeas Corpus and Evidentiary Hearing Request. "Motion for Leave to File Supplemental Petition Addressing all Claims in the First Instance Required by Statute for Judicial Economy with Affidavit," "Reply to State's Response to Defendant's Pro Per Post Conviction Petition for Habeas Corpus," and "Supplement with Notice Pursuant NRS 47.150(2); NRS 47.140(1), that the Untied States Supreme Court has Docketed (#14-10093) the Pretrial Habeas Corpus Matter Pursuant 28 USC 2241(c)(3) from the Mooting of Petitioner's Section 2241 Based on a Subsequent Judgment Obtained in Want of Jurisdiction While Appeal Pending" filed on 07/09/15	5455-5458
State's Response to Defendant's Reply in Support of Supplemental Post-Conviction Petition for Writ of Habeas Corpus filed on 09/03/15	5511-5516
State's Response to Defendant's Supplement to Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) filed on 07/31/15	5473-5475
State's Supplemental Opposition to Motion to Seal Records filed on 04/17/12	3436-3437
Stipulation and Order filed on 02/10/09	0173-0174
Substitution of Attorney filed on 06/29/10	1034-1035
Supplement to Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) filed on 07/13/15	5459-5460
Supplement with Notice Pursuant NRS 47.150 (2); NRS 47.140 (1), That the United State's Supreme Court has Docketed (#14-10093) The Pretrial Habeas Corpus Matter Pursuant 28 U.S.C.§ 2241 ©(3) From the Mooting of Petitioner's Section 2241 Based on a Subsequent Judgment Obtained in Want of Jurisdiction While Appeal Pending filed on 06/17/15	5433-5437
Supplemental Appendix of Exhibits to Petition for a Writ of Habeas Corpus Exhibits One (1) Through Twenty Five (25) filed on 06/12/15	5161-5363
Supplemental Notice of Defendant's Expert Witnesses filed on 07/29/10	1117-1151
Supplemental Notice of Expert Witness filed on 05/17/12	3443-3447
Supplemental Notice of Expert Witnesses filed on 01/03/11	2756-2760
Supplemental Notice of Expert Witnesses filed on 08/13/10	1266-1267
Supplemental Notice of Expert Witnesses filed on 08/16/10	1297-1305
Supplemental Notice of Witnesses filed on 01/14/11	2872-2875
Supplemental Notice of Witnesses filed on 03/10/09	0228-0229
Supplemental Notice of Witnesses filed on 03/11/09	0237-0238
Supplemental Petition for Writ of Habeas Corpus (Post Conviction) filed on 04/08/15	5094-5144
Supplemental Petition for Writ of Habeas Corpus filed on 06/15/15	5364-5419
Verdict filed on 03/20/09	0289
Verdict filed on 06/15/12	3457
Verdict Submitted to the Jury but Returned Unsigned filed on 09/02/10	1397-1398
Writ of Habeas Corpus filed on 01/30/09	0147-0148

TRANSCRIPTS

Transcript – Notice of Motion and Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Improper Evidence and Argument filed on 02/04/11	2974-2989
Transcript – Partial Transcript of the Jury Trial - Day 2 filed on 03/18/09	0240-0244
Transcript – Petrocelli Hearing filed on 05/19/11	3049-3162
Transcript – Proceedings filed on 01/02/09	0028-0124
Transcript – Sentencing August 16, 2012 filed on 12/03/12	4632-4635
Transcript – Sentencing August 28, 2012 filed on 12/03/12	4636-4652
Transcript – Sentencing filed on 07/10/09	0337-0341
Transcript – Status Check: Availability of Dr. Benjamin for Trial filed on 02/04/11	2990-2995

INSTRUCTION NO. 18

Murder of the Second Degree is murder which is:

1) An unlawful killing of a human being with malice aforethought, but without deliberation and premeditation, or

2) Where an involuntary killing occurs in the commission of an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill.

INSTRUCTION NO. 19

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. It is not confined to murder committed with settled design and premeditation but extends to all cases of homicide. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.

INSTRUCTION NO. 24

Involuntary Manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act or a lawful act which probably might produce such a consequence in an unlawful manner; but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being.

exhibit 7

Case No. CE50630

FIRST TRIAL - STATE'S THEORY

OPENING STATEMENT - 2 pages

(ROA Pages 20, 63) - TRANSCRIPT DAY 1

MARCH 16, 2009

exhibit 7

COPY

FILED
JUL 10 2009
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * * *

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

MONDAY, MARCH 16, 2009

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 1

APPEARANCES:

FOR THE PLAINTIFF: PHILLIP SMITH, ESQ.
STEPHANIE GRAHAM, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT: RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
(303) 798-0890

defendant guilty beyond a reasonable doubt, the State has a right to open and close the arguments. After the arguments have been completed, you will retire to deliberate your verdict. At this time, is the State ready for their opening?

MR. SMITH: Yes, Judge.

THE COURT: All right, go ahead.

MR. SMITH: May it please the Court, counsel. Folks, despite the fact that this is a murder trial, I don't really have a long and unwieldy opening statement because fundamentally the facts of this case are pretty simple.

The State anticipates that the evidence that you're going to see throughout this trial is going to show that on November 5th, 2008 here in Clark County, Nevada, the defendant was living with his on again, off again girlfriend, a woman by the name of Victoria Wiemuth. They had been seeing each other for several years dating back to 2001.

I say on again and off again, but obviously in November 2008 they were on again, and in fact, they were living together at a residence located off a street called El Parque. Now, Ms. Wiemuth was actually estranged from her husband. Her actual legal name was Mrs. Victoria Wiemuth. But at the time she was in a relationship with the defendant, Brian O'Keefe.

Mrs. Wiemuth had been estranged for her husband for several years, and in fact, she had a daughter with the husband. The daughter's name was Alexandra. Now, on the night

in question, November 5th, 2008, it's the State's position that the defendant and Victoria Wiemuth got into what we'll call for now an argument or an altercation.

Now, by no means are we conceding this was mutual combat but something happened, and the evidence is going to show you what exactly happened. At the conclusion of this altercation, it's State's position that the evidence is going to show you that the defendant, in fact, stabbed Victoria Wiemuth and that she died.

We also anticipate that the evidence is going to prove to you this was no self-defense, this was not an accident, and it was not a suicide. And that's what we have to prove. We have to prove that the death of Ms. -- Mrs. Wiemuth was unlawful.

We anticipate that we are going to prove that the death in this case was nothing less than an intentional act committed by the defendant against Mrs. Wiemuth. You're also going to hear evidence indicating that the defendant had a motive to kill Mrs. Wiemuth and that he had what we'll describe as an underlying ill will towards Mrs. Wiemuth, which we submit is going to help us meet our burden of proving beyond a reasonable doubt that this was an intentional act.

And at the conclusion of all the evidence in this case, we are going to ask you to return a verdict of guilty to the crime of first degree murder. Thank you.

THE COURT: All right, thank you. Mr. Pike, do you wish to exercise your right for opening at this time?

MR. PIKE: Yes, your Honor.

THE COURT: All right.

MR. PIKE: May it please the Court, ladies and gentlemen of the jury, counsel, Ms. Palin and Brian, this is an opportunity that I have to preview the defense's version of Mr. O'Keefe's version and try to pull together some of the evidence that's going to be produced to you so that when it comes forward to you, it will -- it goes in context. Sometimes we have to call witnesses out of order so the best thing I can describe in opening statement is like a picture on a puzzle box because sometimes we put a piece over here in the corner, and it isn't until we bring in the other pieces that that makes sense and it all kind of fits in.

So once you understand the theory of the State as they presented it, now we're going to show you what the evidence is going to show in this case and why it would be appropriate to come back not with a verdict of guilty of murder in this case.

This is the case of the State versus Brian O'Keefe. It is a case about tragedy and not about murder. It starts out with the State alleging this premeditation. That he thought about it. He had the malice, the ill will that they talked about. But it's not supported by the physical evidence that's

going to come in. This is the apartment where all these events occurred. It was not done in a secret or a premeditated or where somebody snuck to where someone was at and then killed them and tried to get away from what was happening.

It was this on again, off again girlfriend. They were living together. They were living in this apartment and neighbors were around. They walked up. This is where they came. The door was open. The evidence is going to show that when the neighbors came, they came in the door. It was open. This is not something that was done in secret, which is what you would reasonably expect or would interpret as a premeditation or planning.

They were a couple. They lived together. He gave her flowers. They had their clothing together. They kept an apartment. They kept a clean apartment. They had gotten over their past problems. They were hoping for that happy ending that we heard about. And they were back together.

The physical evidence will show that this is a couple that was hoping for a future together. (Indiscernible) the bathroom, the closet space. It appears to be equally divided. They're working side by side with the union. We'll bring in union members to show that as a couple they were open. This is not something where anybody was keeping a secret. They were back together.

Victoria and Brian were inseparable around the union

exhibit 8

Case No. 0250630

Letter of Attorney Appointed

DATED April 22, 2015

Page 2 of 4

exhibit 8

argument that I've ever made. Simply put, I can only argue IAC claims against an actual lawyer, i.e., appellate counsel.

Let me address the issues of your most current letter one by one in hopes that I can explain why they must fail in the current Petition for Writ of Habeas Corpus.

"1) State failed procedural Due Process becoming [sic] a fundamental miscarriage of justice and lack of subject matter jurisdiction by failing to 'Notice' a new alleged unlawful felon 'Act' for support of the judicially admitted 'implied' malice murder charge when the State filed [its] new Second Amended Information charging Malice Murder."

Your argument is misplaced. The Reversal Order (04/07/10) from the 1st trial does not bar any new or revised charges. The 2-page Order simply states that the District Court erred by giving an incorrect jury instruction. The Order does not instruct the State on what they can or cannot file in a successive trial. In essence, the State starts over with the original charges or the State can amend the charges as it sees fit. Double Jeopardy is not an issue. *See* Order of Affirmance (61631) filed on April 10, 2013. You get a new trial.

It does not matter what Patricia Palm, Esq., argued at your 2nd trial when discussing jury instructions. Nothing precluded the State from filing an Amended Information (erroneously titled 2nd Amended Information) on August 19, 2010. The State is authorized to try the theories it feels it is capable of proving beyond a reasonable doubt. The 2nd trial resulted in a "hung jury" and, therefore, you (or Ms. Palm) didn't need to appeal any issues, *etc.* It doesn't matter what was argued at the first trial. Again, Double Jeopardy isn't an issue. The Order of Affirmance (61631) filed on April 10, 2013, suggests this. You get a 3rd trial with a new jury.

"2) (One Continued)." This appears to be a continuation of the first argument, *supra*.

"3) Appellate counsel failed to present issue concerning NRS 175.381."

Again, this argument is tenuous. This isn't an issue for your 1st and 2nd trials because: (1) the first conviction was reversed and remanded for new trial; and (2) the 2nd trial never resulted in a verdict. I think you understand that. Therefore, it appears that you are suggesting that appellate counsel was ineffective for failing to raise certain issues on appeal. I guess appellate counsel could have argued sufficiency of the evidence because you raised it by oral motion pursuant to NRS 175.381 during your 3rd trial. However, sufficiency of the evidence arguments are tough to win AND appellate counsel makes the strategic decision on what to argue on appeal.

You are absolutely correct that the evidence in all the trials is the same, albeit rehashed with "more beefed up argument." You haven't cited any case law that suggests that this is illegal. What is insufficient to one jury may not necessary be insufficient to another. The concept of sufficiency of the evidence is addressed to the court's function, not the jury's. Generally, the court will not submit a case to the jury unless it decides as an initial matter that the State has proven each of the elements essential to its charge by sufficient evidence to justify a finding in its favor upon it. The State's burden for sufficient evidence in a criminal matter is beyond a reasonable doubt. The jury may not presume or infer any fact that has not been presented into

exhibit 9

Case No. C250630

General Verdict Form

FILED MAR 20, 2009

exhibit 9

VER

FILED IN OPEN COURT
MAR 20 2009 @ 7:56 PM
EDWARD A. FRIEDLAND
CLERK OF THE COURT
BY Kristen Brown DEPUT
KRISTEN BROWN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO: C250630

DEPT NO: XVII

VERDICT

We, the jury in the above entitled case, find the Defendant BRIAN KERRY O'KEEFE, as follows:

COUNT 1 – MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)

(please check the appropriate box, select only one)

- ☐ Guilty of FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON
- ☐ Guilty of FIRST DEGREE MURDER
- ☒ Guilty of SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON
- ☐ Guilty of SECOND DEGREE MURDER
- ☐ Guilty of VOLUNTARY MANSLAUGHTER WITH USE OF A DEADLY WEAPON
- ☐ Guilty of VOLUNTARY MANSLAUGHTER
- ☐ Guilty of INVOLUNTARY MANSLAUGHTER WITH USE OF A DEADLY WEAPON
- ☐ Guilty of INVOLUNTARY MANSLAUGHTER
- ☐ Not Guilty

FOREPERSON

03/20/09

000380

exhibit 10

Real case no. 0250630

Discovery Case no. 0205165 ?

• Fake Case No.

DATED Oct. 24, 2015

exhibit 10

VICTIM IMPACT STATEMENT

DATE OCT. 24, 2005

OFFENDER BRIAN KERRY O'KEEFE CC#: C205165

INVESTIGATING OFFICER _____

VICTIM (BUSINESS/INDIVIDUAL) VICTORIA WHITMARSH

SOCIAL SECURITY # 069487107 TAX ID # _____

PO BO 97011 LV NV 89193
MAILING ADDRESS CITY STATE/ZIP CODE

_____
PHYSICAL ADDRESS CITY STATE/ZIP CODE

HOME TELEPHONE # (702) 891-0514 WORK TELEPHONE # (702) 940-1385

A. INSURANCE CLAIM SUBMITTED? YES ____ NO ✓

COMPANY _____

ADDRESS _____

CITY/STATE/ZIP CODE _____

TELEPHONE # (____) _____

CLAIM # _____ POLICY # _____

DEDUCTIBLE $ _____ CLAIM AMOUNT $ _____ SETTLEMENT $ _____

TOTAL OUT-OF POCKET LOSS $ _____ (*Not To Include Lost Wages*)

B. Have you applied for or received County compensation? YES ____ NO ✓ AMOUNT _____

Have you applied for or received State compensation? YES ____ NO ✓ AMOUNT _____

C. Do you intend to address the Court in person? YES ✓ NO ____

005211

exhibit 11

Case no. 0250630

STATE'S CLOSING ARGUMENT
FIRST TRIAL

MARCH 20, 2009

ROA pages 297-301 and 308, 309

exhibit 11

(Off-record bench conference).
THE COURT: I'm sorry, ladies and gentlemen.
(Reading of the jury instructions resumed but not transcribed).
THE COURT: Counsel.
MS. GRAHAM: Yes, Judge. Court's indulgence. I'm not a technical person. I apologize. So Mr. Smith is helping me out setting this up. And while we're waiting to do that, I just -- it's been a long week, I think you'd all agree. It's been a long week. A lot to take in. This is a really serious case. Somebody's dead. It's the State's position that she was murdered, and it's also I'm going to tell you right off the bat, it's the State's position that defendant committed first degree murder with a deadly weapon.
You're going to have a verdict form here that gives lots of options for you to consider. First degree murder with use of a deadly weapon, first degree murder, second degree murder with use of a deadly weapon, second degree murder, voluntary manslaughter with use of a dead weapon, voluntary manslaughter, involuntary manslaughter with use of a deadly, involuntary manslaughter, and obviously not guilty.
The State's position is that this is first degree murder with use of a deadly weapon. You're going to have copies of the jury instructions. I think the judge informed you of that. So I know that that was a lot of stuff to hear

and read. You're not going to have to try to remember it. You're getting copies of all of that to take back with you.
My job now is to try to help explain all of those things that the judge said and how that would apply to this case. And how the evidence in this case proves that he committed first degree murder with use of a deadly weapon, a knife.
Now let's see if this works for me. Your job is very important, as the judge told you when you first got here and through voir dire, and that's why we took a lot of time. The system wouldn't work without you guys because, you know, we want everybody of different backgrounds and different experiences on our jury. Your sole duty when you go back in that deliberation room right now is to determine what crime was committed by the defendant.
Jury instructions, those are the law. That's the law in Nevada per the judge and actually per our legislatures. Whether you agree with the law or not, it's the law, and you all took an oath to follow the law. And what the judge described to you and what my attempts to explain to you the law in the state and of course, defense will explain to you law of the state, that's the law, folks. And that's what you have to apply to the evidence in this case. But, again, you're going to have copies.
Two types of evidence. Direct and circumstantial.

Direct evidence. We heard direct evidence in this case. Direct evidence is evidence from witnesses, okay. You were able to observe them while they testified, to hear the content of their testimony, to judge their credibility by their actions on the stand, their eye contact, their mannerisms. That's really important. And you all have life experience. I mean, you can judge somebody's credibility.
So and credibility's another one of the instructions. But the witnesses, that's direct evidence okay. Their testimony is direct evidence. The weight of that evidence is going to be determined by you. And I just gave an example.
Circumstantial evidence is a chain of facts. And this is real important, okay. Circumstantial evidence is a chain of facts that draws an inference that you can give weight to. And you're to give the same weight to direct evidence, evidence that you've actually heard, as things that can be inferred, and I'll give you an example of that. And I think, you know, the judge gave you an example of that at the beginning of this case.
I guess the best example that comes to my mind is because I'm from the midwest, and it snows there a lot. You are home, you're awake, you lookout the window, you see the snow falling on the ground, you see the snow. That's the direct evidence. The difference between that, circumstantial, is I go to bed that night, I wake up the next morning, I

lookout the window, there's snow all over the ground. I can infer that it snowed last night, right. I mean, that's an inference I can draw because when I went to bed, it -- there was no snow on the ground, I didn't see it snow. I didn't see it snow, but when I woke up, there's snow on the ground, so wouldn't that be a reasonable inference? Yes, that would be a reasonable inference.
And you're to give the same weight to circumstantial evidence as you are to direct evidence. So you can infer. You need to use your common sense. Credibility of the witnesses, live testimony. Like I said, we discussed that. That's so important. You know, we've had so many people testify. We've had officers testify today. We've had the defendant testify. We've had lay witnesses, neighbors testify, medical examiners testify, doctors testify. That live testimony, you can judge the credibility of those witnesses because you were here, you watched, you observed. Europe the ones that are supposed to judge the credibility and their motives to lie.
You can disregard the entire testimony of a witness if you don't find them credible. That's important. If you find any one of our witnesses not credible, you're free under the law to disregard that entire testimony. So remember that. Don't get caught up in trying to figure things out. Common sense. That's a big one want you don't leave it at the door.
There's a jury instruction -- I think there a jury

instruction that says you bring your common sense and life experience in. You don't leave it at the door. That's why there's so many -- you know, on each side of you, you're all different. You all have different life experience. You're to bring that life experience and your common sense into that deliberation room. Don't forget it, okay.

Punishment. Your duty at this point right now when you go back in the deliberation room is confine to the guilt of the defendant. Whether or not he's guilty and what he's guilty of. You were not to discuss punishment. The judge instructed you on that. Or consider the subject of punishment during your deliberations as to his guilt. That cannot be a factor in your determination of what he's guilty for. The judge has instructed you on that, and that is the law in Nevada. You need to put that aside.

What is murder? I'm going to try to break it down. I mean, it's so complicated. There's just -- you know, you -- I was watching some of you. It's like well, what does all that mean? Well, murder is the unlawful killing of a human being with malice aforethought. Malice aforethought can be expressed or implied. What is malice aforethought? We know what killing another human being is, right? Okay. But what's malice aforethought? Intentional killing without legal cause or excuse or what the law would consider adequate provocation.

Okay, so it's intentional. An intentional killing

without legal cause or excuse. Anger, hatred, revenge, ill will or spite is not required for malice, okay. That's in your injury instructions. so don't feel like you're going to have to remember everything that I tell you. Expressed malice is the deliberate intention to take away the life of another. Deliberately do it. Implied malice. Malice can be implied just kind of like the circumstantial evidence kind of thing.

You know, you can imply malice when an considerable provocation appears or when all of the circumstance of a killing show an abandoned or malignant heart. So there's implied malice as well as expressed. It can be deliberate or you can imply it. And you can imply it with no provocation appears and when all of the circumstances showing a killing of an abandoned or malignant heart.

Simply put, malice aforethought means it wasn't an accident, okay. Malice aforethought simply put, not an accident. What is first degree murder? The killing was willful, deliberate, premeditated. All of those have definitions, too, believe it or not. Of course, they do. Okay. And each one is different.

What is willfulness? The intent to kill. The intent to kill -- you intended it kill. That's willful. You know, we kind of all know we what -- we willfully do things everyday. You know, we willfully get in our car and come to the -- start it and drive down to the court house to sit for jury duty.

What happened to my Power Point?

The intent to kill, though, can be a certain or deduced from the facts and circumstances of the killing. So the intention of the person that killed, you can deduce that from all of the facts and circumstance of the evidence that we presented to you today or throughout the week. Most importantly, such as the use of a weapon that's calculated a deduced detective in the manner that it was used and the circumstances surrounding that act. That can be inferred.

Deduced. There doesn't have to be an amount of time, a (indiscernible) amount of time needed between the formation of the intent to kill and the act of killing itself, okay. What is deliberation? You think about it first, you weigh the options, consider the consequences, you make a decision. That decision, folks, can be made very, very quickly by premeditation, decision to kill, formed in the mind of the killer, before the killing. It can be as instantaneous as successive thoughts of the mind. Less than a minute.

The law doesn't measure the length of time of premeditation, okay. It doesn't require how long that thought must be pondered in the mind before it's premeditated. That's really important for you to understand. Time can be varied based on the individual and the circumstances of the evidence that is presented to you. Instantaneous just is successive thought in the mind. The law doesn't look at the duration of

time for premeditation.

If you believe the evidence -- from the evidence that the act constituting the killing has opinion preceded by and has been the result of premeditation, no matter how rapidly, the killing's premeditated.

What is second degree murder? The killing was not deliberate, not premeditated. Just intentional. Voluntary manslaughter. Killing without malice aforethought, deliberation or premeditation with provocation. An example would be a serious injury. Self-defense, maybe. Or somebody is trying to hurt you. With no time to think. An irresistible impulse in the heat of passion.

And the objective standard, though, for that heat of passion is an ordinary person would have killed without thinking. I mean, it's just insane, okay. You're in a circumstance where, you know, let's say that you're at the zoo and a tiger comes out of the cage and he's loose, I mean, it would be -- you wouldn't even think to try to save your daughter or, you know, that's instantaneous. That's an instantaneous -- that's what an ordinary person would do. You know, a situation where an ordinary person would kill.

Involuntary manslaughter, killing without any intent during the commission of an unlawful act or a lawful act which probably might produce such a consequence in an unlawful manner. But where the involuntary killing occurs in the --

commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being the offense is murder.

What's a deadly weapon? Well, it's complicated, according to the law. Any instrument if used in the ordinary manner contemplated by its design and construction will or is likely to cause substantial bodily harm or death. Or any weapon, device, any instrument, under the circumstances it was used or attempt to be used or threaten to be used that's readily capable of causing substantial bodily harm or death is a deadly weapon. And of course, our contention is that a knife was the deadly weapon.

Substantial, what's substantial bodily harm? Substantial bodily harm means that it's bodily injury which creates a substantial risk of death or causes serious impairment, disfigurement or prolonged physical pain. All right, what's self-defense. We use the reasonable person standard. Honest but unreasonable does not negate malice and does not reduce the offense from murder to manslaughter.

It has to be reasonable under the reason person standard. There has to be the threat of eminent death. Eminent means quicker than immediate. Or substantial bodily harm. So there has to be a risk of eminent death or substantial bodily harm, which, again, was, you know, the threat of serious bodily injury.

The killing was absolutely necessary to avoid your death or substantial bodily harm in this case, as it applies in this case. The reasonable person standard. Fear alone is not enough. And you cannot use more force than was necessary under the law. And it doesn't apply to initial aggressors.

Intoxication. We've heard about intoxication. If an intoxicated person has the capacity to form the intent to take a life and he considers and executes that intent, that's no grounds for reducing the degree of this crime. There are other instructions that are the packet. Those are pretty much self-explanatory.

How do we know defendant killed Victoria? Well, for one thing, there's been absolutely no evidence that anybody was in the room but the defendant and Victoria. I don't think identity's an issue in this case. All right, this is how we know it's first degree murder. It wasn't an accident. It was willful. I don't think I have to go through all the facts. You guys, there's been so much testimony here. Use your common sense. Use all the evidence. You can infer that there was no accident here. The medical examiner testified that the location of the wound -- you can view the photos yourself and determine that this was no accident. It was willful. The act of stabbing Victoria was willful.

It was premeditated. He had time to think about it and thought about it. Remember, premeditation can be quick

instantaneous? How do we know all this? Well, I'm going to get to that what it was deliberate. And there was definitely malice aforethought, either express, definitely implied. Okay.

MR. PIKE: Objection, your Honor. May we approach the bench, I'm sorry.

THE COURT: All right.

MR. PIKE: I hate to interrupt Counsel's argument.

(Off-record bench conference).

MS. GRAHAM: Okay. So we look at the evidence before the murder, during the murder and after the murder. What did he say, the defendant? What did he do before the murder? He said I want to kill the bitch. He told Cheryl Morris that. I want to kill the bitch, she's poison. Why? He told her why. She took three years of his life.

You can judge the credibility of Cheryl Morris herself. He even told her how he could kill somebody with a knife. He demonstrated to Cheryl that he can kill somebody with a knife. He talked about his proficiency in the services with a knife. His training. Before the murder he said all that.

What about during the murder? Well, that's a little tougher because we don't really know what was said or exactly in what order that transpired. We know that the Tolivers, who live directly under the defendant and Victoria that night, directly under, were in their bedroom where the murder occurred

directly under. And Joyce told you as she was laying in bed, she heard lots of thumping, lots of noises, a woman crying. She kept turning up the volume. It got louder. It won't go for about an hour. She heard thumps, she heard crying. And then at one point it got so loud, it woke Cookie (phonetic) up. You remember, he jumps up, what the hell? Stick the broom up -- you know, the old broom trick on the ceiling, you know, to try to quiet it down. It didn't quiet it down. It got louder.

And then Cookie was so frickin' irritated because he was awoken. He went up there to tell them to quiet down, and what did he see? Well, he saw Victoria laying there in a pool of blood. And Cookie's reaction is what the hell did you do? He ran down stairs, started calling for people to call 911. Defendant never asked him to call 911. He saw Cookie. Told him to get out. Most importantly, one of the things that we can infer that during the murder, since we don't know exactly how everything transpired, we have photos.

The photos, and you know the saying? A picture is worth a thousand words. These are all going to be back in the jury room, State's Exhibit 35, State's Exhibit 36, State's Exhibit 39, State's Exhibit 46, State's Exhibit 39, State's Exhibit 58, 57. There's more, folks. I'm not going to show you all of them. How about this one, 8? State's Exhibit 60. How about this one, Defendant's Exhibit UUU? That says it all, really. Picture's worth a thousand words.

After, well after -- after, we have Todd coming in the room. Todd Armbruster, remember the neighbor or the maintenance guy that worked on the property? He came in the room because Cookie's like dude, you know, call 911. He's done killed that little girl. Todd goes up there. He goes into the room. He sees Victoria laying on the pool of blood. And what does the defendant do? He says get the fuck out, and he takes a swing at him, right? That's what Todd testified to. You can believe Todd if you want to, but --

So he takes a swing at Todd. Todd calls 911. They leave. Cookie says he sees this face. They all -- Todd, Cookie, and even the neighbor next door, Doonny (phonetic), who saw the defendant that night -- described this face, this scary face that the defendant had. It scared Cookie. You remember he wanted to get the hell out of there. He wanted to get the hell out of there because he said he didn't know what would happen to him.

So defendant didn't call 911. We know that because Detective Wildemann told you that he checked the cell phones, and there was absolutely no entry of 911. I think there were three cell phones, maybe four recovered from that apartment. He didn't call 911. He didn't call for help. If this was an accident, if this was self-defense, if she stabbed herself, you'd call 911 for help.

And when they came, because other people had to call,

you wouldn't have a stand off in the bedroom with them. You would let them attend to a woman that you supposedly love bleeding all over the floor. But that didn't happen. Instead when they got there, you heard from Officer Conn, Santarossa, Ballejos, Taylor, Hutcherson, they were all on the scene. He wasn't going to let them near him and Victoria. They're shouting to him, you know, is she hurt? What is defendant saying? She's dead, she's alive, get the fuck out, go away, fuck you, fuck -- there's so many inconsistent statements. There's so many things the defendant said.

But what we do know is he never would allow -- and the police announce Metro, we need to get her help, is she alive, is she dead? He wouldn't respond want get the fuck out. We need to get medical to her. Get the fuck out. Okay, so what happens, you know? They're worried about this woman laying on the floor. They can't go in there? Why can't they go in there? There's protocol. They don't have him in his line of sight?

They see a woman's foot at first. Sergeant Newberry, I believe peeks around the corner, there was testimony of that, and sees and says cover me, you know. They can't go there. They think he's baiting him, you know. They testified to all the things that he was saying and his demeanor, and they think they're baiting him. He -- they can't see. They don't know if there's a weapon. They just see a woman lying in a pool of

blood on the floor.

They cannot send emergency personnel in a situation, a dynamic situation like that. Defendant would allow -- even if she was alive at that point, he wouldn't allow her to be treated. He would not allow them to enter the room to help her. They had to taze him twice and drag him out of the room. Well, he says he doesn't want to leave her body.

He testified -- I mean -- let's see, what else happened after? Okay, he told Hutcherson, you know, once he was in custody he was put in the back of a patrol car -- a patrol car. He says sorry, V, I didn't mean to hurt you, let's go, let's go, let's do the ten years. Sorry V doesn't cut it. Sorry V.

The fact that you have remorse after you kill someone does not negate the intent to kill at the time. Sorry V, that doesn't cut it. He made so many statements. You know what, I can't -- I'm not even going to go into there because we would be here all week.

You saw the defendant testify in his taped statement. Well, you saw the taped statement that Detective Wildemann -- it was Detective Wildemann and Detective Krieger (phonetic), I believe -- Kieger. You guys saw that. You know how many different statements he made and things he said. You were able to watch his demeanor, and you were able, you know, to observe Detective Wildemann and Detective Krieger with him. You can

judge their credibility and theirs during that interview. And you guys are going to have that, and if you want to, you can watch it again.

He testified today, so you can judge that credibility of him on the stand today, you know. You can infer, you can, you know, the demeanor. You know, there's a box of Kleenex right there. I didn't see one Kleenex lifted out of that box while he was up there. You guys saw it. You know when he said I can't go over it, it's -- there's too much.

You know what's interesting, in opening statement Mr. Pike gave, you know, a brief opening where he said one stab wound, one stab wound. And I find it really ironic that today on the stand the defendant when referred to alcohol, what did he say? One is too many. One drink is too many. Well, one stab wound is too many.

This is much more than second degree murder. Second degree would only apply if defendant acted intentionally but did not have the time to think about what he was doing (indiscernible). No successive thoughts before stabbing Victoria death. He hadn't folks. The facts show he had plenty of time for the weighing of choices and decided to kill despite the possible consequences. There's plenty of time.

I mean, co-counsel Smith's -- even if you believe the defendant's version of, you know, the incident between him and

Victoria, he had plenty of time to think about it. The defendant had time to premeditate. Again, remember premeditation. It's not, you know, planning for days or weeks. Prior to the stabbing defendant had successive thoughts about what he was going to do. This is much more than voluntary manslaughter. Again, defendant had plenty of time to think about what he was about to do, to weigh his choices and consider the consequences. Defendant want the Victoria dead. It's not self-defense.

We talked about self-defense and what that is by law. It's not self-defense. You know, even if you believe the defendant's version that Victoria had the knife and came at him and was the initial aggressor, you know, he's bigger. What did everybody say, all the neighbors? She's an itty bitty thing. She was a little thing. You know, we have her driver's license. She was what -- well, he even admitted, what, she's five, four, a buck ten, as Mr. Smith said. You know, she's a little bitty thing.

And he could have used other means. So self-defense is just absolutely -- it -- it's so far from the realm of self-defense. Deadly weapon. This is a murder with use of a deadly weapon. The knife was the cause of death, okay. According to the law, I at this point that this would qualify, even though Wolfgang Puck probably didn't contemplate his butcher knife being used to stab somebody to death, I think

that this certainly qualifies under the law as a deadly weapon. He talked about his proficiency with a knife.

In conclusion, after weighing all of the evidence -- and there's a lot, you guys have a task ahead of you -- State is asking you to return a verdict of guilt for first degree murder with use of a deadly weapon. Thank you.

THE COURT: Thank you, Ms. Gram. Ms. Palm.

MS. PALM: Thank you, Judge. Good afternoon, ladies and gentlemen. This may be your last time that I get to talk to you because as you heard at the beginning of this case, if you come back with anything other than a first degree murder verdict, we're done. If you come back with a first degree murder verdict, then we would be doing another penalty phase after this. So and after my closing today, the State will get another chance. They get that other chance to argue again because they have the burden of proof.

MS. GRAHAM: Objection, Judge. You know, the law says --

MR. SMITH: Can we approach?

MS. GRAHAM: -- that we're not --

MR. SMITH: Let's approach.

THE COURT: Sustained. No, overruled. Go ahead, Ms. Palm, you're fine. Go ahead.

MS. PALM: So they will argue again, and this will be it for us. I just want to address some points that Ms. Graham

told you in the -- talked about regarding the jury instructions. When Mr. Pitts argued to you, he told you that you should start your deliberations in this case with a second degree murder or in other words, you'll be able to rule out a first degree murder pretty fast, and here's why: Instruction 34 tells you how you consider evidence of voluntary intoxication, and you can consider that evidence to reduce the intent -- as far as the intent requirement for a murder.

A first degree premeditated murder, as instruction 16 will tell you, requires -- oops. It requires deliberation. That's this right here. Deliberation's the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action. A deliberate determination may be arrived at in a short period of time, but in all cases the determination must not be formed in passion or if formed in passion, it must be carried out after there's been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even if it includes the intent to kill.

And also, a first degree murder requires that you find premeditation. As far as premeditation is defined, the meth (indiscernible) duration of time, but the extent of the reflection. A cold, calculated, judgment and decision may be an arrived in a short period of time, but a mere unconsidered

and rash impulse, even though it includes an intent to kill, is not a deliberation, and premeditation as will fix the unlawful killing of murder of the first degree.

So you can consider Mr. O'Keefe's extreme intoxication when you're considering whether the State has proved to you a first degree murder, and I submit to you they have not. In addition the State has the burden of proving, before you consider any of crimes, they have the burden of proving beyond a reasonable doubt the absence of self-defense and accident. They have not done so.

And I also submit that Ms. Graham has spoke a little bit as far as implied malice because implied malice in this case does not apply to a first degree murder theory. If you were going to find guilt under a theory of implied malice, you have to only go to second degree murder.

And there's another instruction that might be a little confusing to you, and that is instruction 18. It talks about second degree murder. The only part of this instruction that applies to this case is the first part, murder of the second degree is murder which is an unlawful killing of a human being with malice aforethought, the same thing required for third degree murder, but without the deliberation and premeditation for a first degree murder.

MR. SMITH: Judge, may we approach?

THE COURT: I think it's okay. It's argument. Go

that she's dead, Mr. O'Keefe breaks down and cries. The video didn't support that. What it showed was a person who sat there for several seconds and then began to kind of whine. And you heard the testimony from the detective who was actually there, that he saw no tears, he saw no welling up of her eyes, he saw no reaction. That's because he already knew she was dead. He was just kind of playing a game.

Now let's talk about credibility. They've already said the credibility instruction, and we're talking about Cheryl Morris. Now, the defense attorney wants you to believe that Cheryl Morris came in here and basically told you a lion the stand because she was a jilted ex-girlfriend. But this is the same ex-girlfriend that the defense attorney called and said hey, you know, we think that Mr. O'Keefe's -- you still have Mr. O'Keefe's glasses, can you bring them. She brought them.

Does that sound like the woman who has an ax to grind? She brought the man's glasses. When asked on the stand well, why are you here, because I was subpoenaed. She's subpoenaed, she gets on the stand, she's take an oath where she's asked questions, she tells the -- she provides the answers. She certainly didn't seem like a woman scorn. They want you to believe that this is hell hath no fury like a woman scorned simply because the defendant cheated on her sometime ago.

But you also heard that Ms. Witmarsh stopped dealing with Mr. O'Keefe in August when she moved out. And now some six or seven months later he want you to believe that she still has this pinned up aggression that she would craft this preposterous story about -- they want you to believe it's preposterous, but that she would make up this story about what the defendant told her about his underlying disdain or enmity towards Victoria Witmarsh because what had happened.

Now, some of you may say but yeah, they were together at the time. Sure, but that doesn't mean that he didn't have some deep seeded disdain for what happened during that time she testified against him in front of a jury of people like you. It doesn't change the fact because there could be an alternate scenario as to what happened that night, and I'll get to that in a second.

You heard Ms. Witmarsh say that the defendant told her that he wanted to kill the bitch because she took away three years of his life by testifying against him. Take into consideration that her testimony is corroborated by the evidence. The judgment of conviction that's been admitted into evidence, folks, read it.

The defendant said that he served about two years, but I'd ask you this, how would Cheryl know this information unless the defendant told her? Cheryl testified that the defendant told her he was proficient with knives. When asked

on direct examination, did you ever demonstrate on her how you could kill somebody with a knife? He said well, no, I didn't demonstrate. Well, certainly that can infer that he admits that he at least told her.

Why would she make that up? Because she hates him? I don't think so. And let's talk about the testimony of Joyce and Todd and the timing here. The evidence certainly supports that there was noise coming from that apartment for an extensive period of time. Not five minutes, not ten minutes, but for an extensive period of time. And at some point it got to loud that Mr. Tolliver went upstairs to find out what was going on. And we all know what happened after that, the police were called.

This brings me to circumstantial evidence. You heard Joyce Tolliver talk about how she could hear the woman crying during the time that she heard that noise. Some of you might be thinking well, this whole scenario could have been avoided if Ms. Tolliver had called the police. That might be true, but that doesn't change the facts of this case, folks. And it doesn't get the defendant off the hook.

You got a woman crying, you got loud noises, you have signs of disturbance inside that apartment, inside that bedroom, and you have a woman looking like the way she looks in those photographs with all those bruises. You have an injury to the front of her head. You have an injury to the back of

her head. That's certainly circumstantial evidence of a battery or something that precipitated a stabbing.

Now, if he started this, he can't now claim self-defense because the law says the initial aggressor does not have the right to self-defense. That's the law, Mr. Pike -- excuse me, Ms. Pabs also said that doubt Cheryl Morris' credibility because she called the police. Well, it's reasonable to infer it's because she learned what had happened in that apartment, and she had some relevant information to provide. That's not unlike something that anyone would do under those circumstances. Not just a person who had an ax to grind.

The night in question the defendant never said look, this is where I got injured. But not some several months later, he wants to fall back on that as some evidence corroborating that this little woman trying to kill him that night. Folks, it's unreasonable under these circumstances.

Now, with regards to the testimony about the DNA, you can't really conclude anything from that but except that two people came into contact with knife, Victoria Witmarsh and Brian O'Keefe. And the reason why is because the defendant doesn't even know what happened to that knife after she got stabbed, and you can see on the pictures that there's pillowcases laying on top of it. There's an indication that the blade may have been wiped off. I mean, you can't just --

you can't really just trust the testimony of Dr. Schiro and that his interpretation means that these wounds are totally defensive because I've shown how they aren't.

Now, briefly allow me to talk about the defendant's testimony on the stand. He tells you about his military service some 25 years ago. We know since then some things have happened in his life. The law says that you can take, for instance, his felony convictions as evidence in assessing his credibility, especially when combined with the fact that he's -- the story's he's given today is inconsistent with the story he told Cheryl Wittmann (sic), and it's inconsistent with the story he gave on that videotape.

Folks, I'm almost done. Ms. Palm wants you to consider the defendant's actions after this happened as evidence that he didn't mean anything to happen on the night in question, but that's not what the law says. The law says you determine a person's intent at the moment they commit the act. And that makes sense because sure, a lot of times people are sorry that they kill somebody after it's happened and/or before they get caught. But it doesn't mean -- it doesn't make the underlying act any less criminal.

Now, in talking about reasonable doubt, the instruction tells you exactly what reasonable doubt is. It says doubt to be reasonable must be actual, not mere possibility or speculation. I submit to you the story that the

defendant gave does not comport with the evidence, and I'm talking about the story he gave today and yesterday on the stand. He said that she fell backwards, he fell on top of her, and somehow she ends up stabbed.

Now, folks, if you land on -- I submit to you that if you land on somebody with all your body weight and you weigh 190 something pounds and you land on them and a knife goes into them because your entire body weight is on them and they only weigh a hundred pounds, the blade is going to go in a lot further than four inches. It's going to go all the way in because all your weight is on there.

But here, the length of the wound was four inches, which is consistent with an intentional stabbing, but consistent with an accidental stabbing where you fall on top of the person holding the knife. That's another part of common sense. So what we're asking you to do here is to use some common sense, realize that the credibility of the State's witnesses shouldn't be questioned under the circumstances of this case, take into the fact -- take in fact that the State's evidence has corroboration. Go ask me to convict him. We've met our burden. The burden is beyond a reasonable doubt. It says that if you find an abiding conviction and the truth of the charge, there is no reasonable doubt. Thank you.

THE COURT: Thank you, Mr. Smith. The clerk will now swear in the marshal to take charge of the jury panel.

(Swearing in the marshal)

(Outside the presence of the jury)

THE COURT: Let the record reflect we're outside the presence of the jury panel. I just want to put on the record when I read the jury instructions, instruction number 3, as was provided to counsel, actually I read it as is, but it was retyped because if you look at line 11, the word instructions was broken up on the line, and that was just retyped. And so the corrected -- or the typed version is provided to the jury.

Instruction 42 that was original provided to the attorneys at line 7 and line 8 it says read backs, and I had that -- I read it as play back, but it's originally typed for both counsel and read backs, and so that was fixed.

And instruction 43, which you had copies of, was just the instruction that I signed, and the signature line was moved up. So three changes were made and those changes were included in the packet of jury instructions provided to the jury panel. And everyone has provided their cell phone numbers to the clerk, and please within 15, 20 minutes of the court house to be called. It's my understanding is that they wish to deliberate tonight and --

MR. PIKE: I plan on staying here --

THE COURT: Okay.

MR. PIKE: -- until (indiscernible).

MS. PALM: Yes, I'll be here, too.

THE COURT: All right.

MS. GRAHAM: Judge, (indiscernible).

MR. SMITH: I'll be here but no guarantee I'll be sober.

THE COURT: Okay.

MS. PALM: Yeah, me either.

THE COURT: That's off the record, Michelle.

(Court recessed at 4:02:58 p.m. until 7:12:33 p.m.)

(In the presence of the jury)

THE COURT: You may be seated. I understand that we have a verdict, and Mr. Livermash, are you the foreperson?

JUROR NO. 6: Yes, sir.

THE COURT: Please hand the verdict form to the marshal. The clerk will now read the verdict.

THE CLERK: District Court, Clark County, Nevada, State of Nevada, plaintiff versus Brian Kerry O'Keefe, defendant. Case No. C2566 -- 250630, Department No. 17. Verdict. We the jury in the above-entitled case find the defendant, Brian Kerry O'Keefe, as follows: Count one, murder with use of a deadly weapon, open murder, guilty of second degree murder with use of a deadly weapon. Dated this March 20th, 2009. Signed by the foreperson, Kirk Livermash. Ladies and gentlemen of the jury, is this your verdict as read? So say you one, so say you all.

THE JURY: Yes.

exhibit 12

CL50630

Case no. 2:11-cv-02109-GMN-VCF

ORDER FILED Jan. 6th, 2012

Emphasis: see page 5, highlighted

exhibit 12

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRIAN KERRY O'KEEFE,

Petitioner,

vs.

SHERIFF DOUG GILLESPIE, *et al.*,

Respondents.

2:11-cv-02109-GMN-VCF

ORDER

This habeas matter under 28 U.S.C. § 2241 comes before the court for initial review under Rules 1(b) and 4 of the Rules Governing Section 2254 Cases. The filing fee has been paid.

Petitioner seeks to present constitutional claims regarding his pending Nevada state prosecution, including a double jeopardy claim. On initial review, a substantial question exists on the face of the petition and accompanying papers as to whether the claims in the petition have been exhausted. Moreover, it appears that Ground 3 further should be dismissed without prejudice under the absention doctrine in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Petitioner therefore must show cause in writing why the petition should not be dismissed without prejudice for lack of exhaustion and/or based upon *Younger* abstention as to Ground 3.

Background

Petitioner Brian O'Keefe currently is being prosecuted in Nevada state court for the murder of his girlfriend. A third trial on the murder charge currently is scheduled.

In the first trial, the jury found O'Keefe guilty of one count of second-degree murder with the use of a deadly weapon. On direct appeal, the Supreme Court of Nevada reversed and remanded on the following basis:

> Appellant Brian Kerry O'Keefe contends that the district court erred by giving the State's proposed instruction on second-degree murder because it set forth an alternative theory of second-degree murder, the charging instrument did not allege this alternate theory, and no evidence supported this theory. We agree. . . . . Here, the district court abused its discretion when it instructed the jury that second-degree murder includes involuntary killings that occur in the commission of an unlawful act because the State's charging document did not allege that O'Keefe killed the victim while he was committing an unlawful act and the evidence presented at trial did not support this theory of second-degree murder. Cf., Jennings v. State, 116 Nev. 488, 490, 998 P.2d 557, 559 (2000)(adding an additional theory of murder at the close of the case violates the Sixth Amendment and NRS 173.075(1)). The district court's error in giving this instruction was not harmless because it is not clear beyond a reasonable doubt that a rational juror would have found O'Keefe guilty of second-degree murder absent the error. See Neder v. United States, 527 U.S. 1, 18-19 (1999); Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). . . .

April 7, 2010, Order of Reversal and Remand, at 1-2 (#1, at electronic docketing pages 10-11).

The second trial ended in a mistrial after the jury deadlocked on a verdict.

Petitioner thereafter moved to dismiss on double jeopardy grounds. The state district court denied the motion, and petitioner filed an original writ petition in the Supreme Court of Nevada. The state supreme court denied relief on the following basis:

> . . . . O'Keefe claims that pervasive prosecutorial misconduct in the second trial and the State's efforts to call different witnesses in his upcoming trial operate as an exception to the well-settled proposition that double jeopardy poses no obstacle to a retrial following a hung jury. See Arizona v. Washington, 434 U.S. 497, 509 (1978). We disagree. First, the district court, in resolving O'Keefe's motion to dismiss, concluded that there was no prejudicial misconduct by the State in the last trial. Moreover, the fact that the district court declared a mistrial because the jury was hopelessly deadlocked remains dispositive. See United States v. Perez, 22 U.S. 579, 580 (1824). We therefore conclude that double jeopardy poses no bar to O'Keefe's retrial and decline to intervene in this matter.

May 10, 2011, Order Denying Petition, at 1-2 (#1, at electronic docketing pages 12-13) (footnote declining to reach non-double jeopardy claims omitted).

Petitioner mailed the present federal petition for filing on or about December 20, 2011. He seeks federal intervention to bar the third trial, which is currently scheduled according to the petition for on or about June 11, 2012.

Discussion

As backdrop, petitioner appears to rely upon *Stow v. Murashige*, 389 F.3d 880, 888 (9th Cir. 2004), as support for the proposition that he can seek federal intervention in the pending state criminal proceedings under § 2241 prior to a judgment of conviction because he is raising a double jeopardy challenge. However, while a petitioner may pursue a double jeopardy claim in federal habeas proceedings before the conclusion of the state proceedings, the claim raised in federal court still must have been exhausted in the state courts. *See,eg.*, *Mannes v. Gillespie*, 967 F.2d 1310, 1312 & 1316 n.2 (9th Cir. 1992). Moreover, as discussed, *infra*, the exception to the general rule that federal courts do not intervene in pending state criminal proceedings extends only to double jeopardy claims, not also to other constitutional claims.

Exhaustion

Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state court remedies on a claim before presenting that claim to the federal courts. To satisfy this exhaustion requirement, the claim must have been fairly presented to the state courts completely through to the highest court available, in this case the Supreme Court of Nevada. *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9^{th} Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9^{th} Cir. 2003). In the state courts, the petitioner must refer to the specific federal constitutional guarantee and must also state the facts that entitle the petitioner to relief on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9^{th} Cir. 2000). That is, fair presentation requires that the petitioner present the state courts with both the operative facts and the federal legal theory upon which his claim is based. *E.g., Castillo v. McFadden*, 399 F.3d 993, 999 (9^{th} Cir. 2005). The exhaustion requirement insures that the

state courts, as a matter of federal-state comity, will have the first opportunity to pass upon and correct alleged violations of federal constitutional guarantees. *See,e.g., Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

In the present case, petitioner concedes in the petition that he did not present any of the grounds of the petition to the state courts through to the Supreme Court of Nevada.

In Ground 1, petitioner raises a double jeopardy claim. Petitioner acknowledged in the responses to the exhaustion queries in the petition that Ground 1 was not raised on a direct appeal, in a post-conviction petition, or in any other proceeding. He either checked "no" or indicated "not applicable" as to each such situation.

The double jeopardy claim raised in Ground 1 is not the same claim as the double jeopardy claim considered by the Supreme Court of Nevada on the petition filed in that court. The state supreme court considered a double jeopardy claim based upon an assertion that double jeopardy should bar a third trial because the State allegedly engaged in prosecutorial misconduct in and after the *second* trial. The double jeopardy claim in Ground 1 instead is based upon different operative facts. In Ground 1, petitioner claims that the state supreme court's reversal *after* the *first* trial was based upon a finding of insufficient evidence is tantamount to a dismissal. Presentation of the double jeopardy claim considered by the state supreme court in the petition there did not exhaust the double jeopardy claim based on different operative facts that is presented in Ground 1.

Ground 1, as conceded by petitioner, thus plainly is unexhausted.

Petitioner further expressly concedes that the claims in Grounds 2 and 3 also are unexhausted, indicating "no," "n/a," and "not this issue" in the appropriate spaces in response to the exhaustion inquiries in the petition.

Petitioner therefore must show cause why the wholly unexhausted petition should not be dismissed without prejudice for lack of exhaustion.

Younger Abstention

As a general rule, even when the claims in a petition, *arguendo*, otherwise have been fully exhausted in the state courts, a federal court will not entertain a habeas petition seeking

intervention in a pending state criminal proceeding, absent special circumstances. *See,e.g., Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983); *Carden v. Montana*, 626 F.2d 82, 83-85 (9th Cir. 1980); *Davidson v. Klinger*, 411 F.2d 746 (9th Cir. 1969). This rule of restraint ultimately is grounded in principles of comity that flow from the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Under the *Younger* abstention doctrine, federal courts may not interfere with pending state criminal proceedings absent extraordinary circumstances. As noted previously, however, consideration of pretrial double jeopardy claims constitutes an exception to this abstention doctrine. *E.g., Mannes, supra.*

In the present case, Ground 1 is a double jeopardy claim, and the collateral estoppel claim in Ground 2 would appear to be based upon double jeopardy protections.

Ground 3, in contrast, asserts a claim of ineffective assistance of trial counsel. Ground 3 thus would appear to be subject to the general rule of *Younger* requiring that the federal court abstain from interfering with the pending state criminal proceeding.

Petitioner therefore must show cause why Ground 3, even if *arguendo* exhausted, should not be dismissed without prejudice under the *Younger* abstention doctrine.

IT FURTHER IS ORDERED that, within thirty (30) days of entry of this order, petitioner shall SHOW CAUSE in writing why: (a) the petition should not be dismissed without prejudice for lack of exhaustion; and (b) why Ground 3 also is not subject to dismissal without prejudice based upon the *Younger* abstention doctrine.

IT FURTHER IS ORDERED that, if petitioner maintains that any claims in the petition have been exhausted, petitioner shall attach with his show cause response copies of any and all papers that were accepted for filing in the state courts that he contends demonstrate that the claims are exhausted.

If petitioner does not timely and fully respond to this order, or does not show adequate cause as required, the entire petition will be dismissed without further advance notice.[1]

[1]The Court has not completed initial review herein as to other potential issues, and this order does not explicitly or implicitly hold that the petition otherwise is free of deficiencies.

The Clerk of Court shall send the petitioner a copy of his petition and attachments together with this order. The motion for appointment of counsel will remain under submission pending receipt and consideration of a response to this order. The Court does not find that the interests of justice require the appointment of counsel prior to consideration of any show cause response filed.

DATED this 6th day of January, 2012.

Gloria M. Navarro
United States District Judge

exhibit 13

C250630

9th CASE no. 12-15271

COA

FILED APR 13, 2012

exhibit 13

005227

FILED

UNITED STATES COURT OF APPEALS

APR 13 2012

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRIAN KERRY O'KEEFE,

Petitioner - Appellant,

v.

DOUG GILLESPIE, Sheriff; et al.,

Respondents - Appellees.

No. 12-15271

D.C. No. 2:11-cv-02109-GMN-VCF
District of Nevada,
Las Vegas

ORDER

Before: PAEZ and CLIFTON, Circuit Judges.

After reviewing the underlying petition and concluding that it states at least one federal constitutional claim debatable among jurists of reason, namely, a double jeopardy violation, we grant the request for a certificate of appealability with respect to the following issues: (1) whether the district court properly determined that appellant's double jeopardy claim was unexhausted, and (2) whether appellant, as a state pre-trial detainee, was required to exhaust his claim in state court before filing his 28 U.S.C. § 2241 petition, *compare Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 489-91 (1973) (emphasizing that the § 2241 petitioner "exhausted all available state court remedies for consideration of [his speedy trial] constitutional claim") *with White v. Lambert*, 370 F.3d 1002, 1008 (9th Cir. 2004) ("If we were to allow White to proceed under 28 U.S.C. §

2241, he would not be subject to . . . state court exhaustion requirements."). *See* 28 U.S.C. § 2253(c)(3); *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012); *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000); *Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000); *see also* 9th Cir. R. 22-1(e).

A review of this court's docket reflects that the filing and docketing fees for this appeal remain due. Within 21 days of the filing date of this order, appellant shall either (1) pay to the district court the $455.00 filing and docketing fees for this appeal and file in this court proof of such payment; or (2) file in this court a motion to proceed in forma pauperis, accompanied by a completed CJA Form 23. Failure to pay the fees or file a motion to proceed in forma pauperis shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

If appellant moves to proceed in forma pauperis, appellant may simultaneously file a motion for appointment of counsel.

The Clerk shall serve a copy of CJA Form 23 on appellant.

If appellant pays the fees, the following briefing schedule shall apply: the opening brief is due June 25, 2012. There was no appearance by the appellees in the district court. The Clerk shall serve a copy of this order on the Office of the Attorney General, Grant Sawyer Bldg., 555 E. Washington Ave. Suite 3900, Las

Vegas, Nevada 89101, who is requested to enter a notice of appearance on behalf of appellees in this case. If Doug Gillespie, State of Nevada, and Attorney General are no longer the appropriate appellees in this case, counsel for appellees is directed to file simultaneously a motion to substitute party. *See* Fed. R. App. P. 43(c).

By July 25, 2012, appellees shall file an answering brief or a letter indicating that no answering brief will be filed. If appellees file an answering brief, the optional reply brief will be due 14 days after service of the answering brief. If appellant files a motion to proceed in forma pauperis, the briefing schedule will be set upon disposition of the motion.

FINANCIAL AFFIDAVIT

IN SUPPORT OF REQUEST FOR ATTORNEY/EXPERT OR OTHER COURT SERVICES WITHOUT PAYMENT OF FEE

IN UNITED STATES ☐ MAGISTRATE ☐ DISTRICT ☐ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF

_____ V.S. _____

FOR

AT

LOCATION NUMBER

PERSON REPRESENTED (Show your full name)

CHARGE/OFFENSE (describe if applicable & check box →) ☐ Felony ☐ Misdemeanor

1 ☐ Defendant – Adult
2 ☐ Defendant – Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other

DOCKET NUMBERS
Magistrate
District Court
Court of Appeals

ANSWER ALL QUESTIONS REGARDING ABILITY TO PAY

EMPLOYMENT

Are you now employed? ☐ Yes ☐ No ☐ Am Self-Employed

Name and address of employer:

IF YES, how much do you earn per month? $

IF NO, give month and year of last employment
How much did you earn per month? $

If married is your Spouse employed? ☐ Yes ☐ No

IF YES, how much does your Spouse earn per month? $

If a minor under age 21, what is your Parents or Guardian's approximate monthly income? $

ASSETS

OTHER INCOME

Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, retirement or annuity payments, or other sources? ☐ Yes ☐ No

IF YES, GIVE THE AMOUNT RECEIVED & IDENTIFY THE SOURCES

	RECEIVED	SOURCES
$		

CASH

Have you any cash on hand or money in savings or checking accounts? ☐ Yes ☐ No IF YES, state total amount $

PROPERTY

Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? ☐ Yes ☐ No

IF YES, GIVE THE VALUE AND DESCRIBE IT

VALUE	DESCRIPTION

DEPENDENTS

MARITAL STATUS
___ SINGLE
___ MARRIED
___ WIDOWED
___ SEPARATED OR DIVORCED

Total No. of Dependents ___

List persons you actually support and your relationship to them

OBLIGATIONS & DEBTS

DEBTS & MONTHLY BILLS (LIST ALL CREDITORS, INCLUDING BANKS, LOAN COMPANIES, CHARGE ACCOUNTS, ETC.)

APARTMENT OR HOME	Creditors	Total Debt	Monthly Payment
		$	$
		$	$
		$	$
		$	$

I certify under penalty of perjury that the foregoing is true and correct. Executed on (date) _____

SIGNATURE OF DEFENDANT (OR PERSON REPRESENTED) _____

005231

exhibit 14

C250630

S.C.N. No. 61631

ORDER OF AFFIRMANCE

FILED APR 10 2013

exhibit 14

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61631

FILED

APR 10 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

First, appellant Brian O'Keefe argues that his conviction violates double jeopardy because this court reversed his prior conviction for the same offense after concluding that insufficient evidence was presented at trial. O'Keefe is mistaken. This court reversed his prior conviction because the jury was erroneously instructed regarding a theory that the killing occurred during the commission of an unlawful act, which was not alleged in the charging document and was not supported by the evidence. O'Keefe v. State, Docket No. 53859 (Order of Reversal and Remand, April 7, 2010). Double jeopardy does not preclude O'Keefe's instant conviction under an alternate theory of second-degree murder which was presented at his first trial and alleged in the charging document. See Parker v. Norris, 64 F.3d 1178, 1180-82 (8th Cir. 1995) (finding no double jeopardy violation where defendant's conviction for felony murder was reversed due to error and defendant was convicted at a second trial under an alternative theory of murder); see also Stephans v.

State, 127 Nev. ___, ___, 262 P.3d 727, 734 (2011) (the remedy for errors unrelated to sufficiency of the evidence is reversal and remand for a new trial, not an acquittal).

Second, O'Keefe argues that the district court abused its discretion by allowing him to represent himself at trial because his decision to do so was not knowing, voluntary, and intelligent. Before granting O'Keefe's request, the district court conducted an appropriate canvass pursuant to Faretta v. California, 422 U.S. 806 (1975), during which O'Keefe stated that he spent several years studying the law and understood the nature of the charges against him, the potential penalties he faced, and the dangers of self-representation. Although O'Keefe asserts that his poor performance at trial demonstrates his decision was unknowing, "'a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation,'" Vanisi v. State, 117 Nev. 330, 341, 22 P.3d 1164, 1172 (2001) (quoting Godinez v. Moran, 509 U.S. 389, 400 (1993)), and the record reflects that O'Keefe voluntarily chose to represent himself despite full knowledge of the risks. We conclude that the district court did not abuse its discretion by granting O'Keefe's request for self-representation. See Hooks v. State, 124 Nev. 48, 55, 176 P.3d 1081, 1085 (2008) (reviewing the record as a whole and giving deference to a district court's decision to allow a defendant to waive his right to counsel).

Third, O'Keefe argues that the district court abused its discretion by denying his request to stay or continue trial for approximately nine months because he had pending proceedings in federal court and was unprepared for trial. The district court rejected O'Keefe's assertion that his federal proceedings in any way limited his ability to

prepare for trial and noted that O'Keefe asked to represent himself and was given ample time to do so effectively. We conclude that the district court did not abuse its discretion by denying O'Keefe's request for an extended continuance where the delay was his fault. See Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007).

Fourth, O'Keefe argues that the district court erred by allowing a substitute judge to preside over his trial because the original judge was more familiar with the case and its complex procedural posture. O'Keefe does not demonstrate how he was prejudiced by the substitution of a different judge. See generally United States v. Lane, 708 F.2d 1394, 1398 (9th Cir. 1983) (error involving substitution of judges is harmless if the defendant has not been prejudiced). We conclude that O'Keefe fails to demonstrate that the district court erred.

Fifth, O'Keefe argues that the district court abused its discretion by rejecting his proposed instructions and by giving instructions over his objection. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Because O'Keefe has not provided this court with the instructions given at trial, he fails to demonstrate that the district court abused its discretion by rejecting his proposed instruction. See generally Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002) (noting that a district court does not err by refusing an accurate instruction related to the defendant's theory of the case if it is substantially covered by other instructions); see also Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). O'Keefe also does not identify which

instructions he contends were erroneously given. We conclude that he fails to demonstrate that the district court abused its discretion.

Having considered O'Keefe's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.[1]

Hardesty, J.

Parraguirre, J.

Cherry, J.

cc: Hon. Michael Villani, District Judge
Bellon & Maningo, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

---

[1]O'Keefe's fast track statement does not comply with NRAP 3C(h)(1) and 32(a)(4) because it does not have 1-inch margins on all four sides. We caution counsel that future failure to comply with formatting requirements when filing briefs with this court may result in the imposition of sanctions. NRAP 3C(n).

We deny O'Keefe's request for full briefing because it does not comply with NRAP 3C(k)(2), as it was not filed separate from the fast track statement. Further, although O'Keefe explains that full briefing is requested so that each issue may be adequately set forth and appropriate legal authority cited, we note that he did not file a motion for excess pages. See NRAP 3C(k)(2)(C).

exhibit 15

C250630

SECOND - TRIAL - DAY 7

HASHING OF J.I.'s

State Judicial Admissions

EOR 97, 98, 99, 100, 101

exhibit 15

COPY

FILED
Nov 22 10 24 AM '10

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

CLERK OF THE COURT

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

DEPT. NO. 17

Transcript of Proceedings

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

ROUGH DRAFT TRANSCRIPT OF JURY TRIAL - DAY 7

TUESDAY, AUGUST 31, 2010

APPEARANCES:

FOR THE PLAINTIFF: CHRISTOPHER LALLI, ESQ.
Assistant District Attorney

STEPHANIE GRAHAM, ESQ.
Deputy District Attorney

FOR THE DEFENDANT: PATRICIA PALM, ESQ.
Special Deputy Public Defender

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

2:11-cv-02109-GMN-VCF

the jury can consider alcohol intoxication or not.

THE COURT: Okay. All right, let's deal with the voluntary instruction.

MR. LALLI: The voluntariness?

THE COURT: Involuntary.

MR. LALLI: Oh, and just -- just for the court's edification, the modifications that we had discussed at the last break on the voluntariness, I've made those and I e-mailed the version to the court.

THE COURT: Yes, I do have those.

MS. PALM: And your Honor, my involuntary instruction is at Page 13 of my instruction packet.

THE COURT: All right. Do you have that one, Mr. Lalli?

MR. LALLI: I do.

THE COURT: All right. Do you have any objection to the giving of the instruction?

MR. LALLI: Yes.

THE COURT: Okay.

MR. LALLI: A number of objections. Number one, it's not their theory of the case. And I think throughout these proceedings and pleadings, while settling instructions, it is abundantly clear it is not their theory of the case. Their theory is that this was an accident and/or it was some form of or some ilk of self-defense. That's their defense, not

involuntary manslaughter.

The problem with the involuntary manslaughter is what the defense is attempting to do in this instruction, and part of it is taking -- taken from NRS 200.070, they're only citing a portion of the instruction. They're -- they're not citing the complete statute on -- on involuntary manslaughter.

They've -- they've removed a section. When this case was reversed by the Supreme Court, they looked at this issue of involuntary manslaughter and how it operated with second degree murder. Obviously, the court well knows those two things are related. Has to do with when does an involuntary manslaughter become a second degree murder.

I'm entitled to the entire instruction if it's given. The problem is that is precisely the reason it got reversed. And our Supreme Court said there is no evidence to support this. Not only is the instruction improper, but there's no evidence to support it. They said that in their opinion reversing the case.

So it's not their theory, there's no evidence to support it, and -- and just as a matter of the record as -- as we've seen it thus far, there is no evidence to support it. And finally, it creates this issue, this legal issue that the -- the -- the Supreme Court has already said is a problem. So you can't just give part of the statute. You've gotta give all of it. And that is going to create a problem.

THE COURT: All right, thank you. Ms. Palm.

MS. PALM: Well, your Honor, when the reversal came back it was because the instruction had gone to the jury, which we objected to, and the court had determined not to give, but ended up in the packet anyway addressing a second degree murder based on a felony murder theory unlawful act.

And the court said there's no notice of such a theory and there was no evidence of such an unlawful act. So that's the problem when -- why it got reversed. As far as the involuntary goes, the statute has two alternative ways you can have an involuntary. You can have the lawful act involuntary or the unlawful act involuntary.

What I did with this instruction is I took out the language from the statute for the unlawful act because that's what would be a problem in this case. There's been no notice that he did an unlawful act. But you still have the regular involuntary that's based on recklessness doing a lawful act. And I think that we do have evidence in this case from which the jury could find that.

There's evidence that she was coming at him with a knife. And there was evidence that he was extremely intoxicated. The jury could determine that -- that if there was a killing, it happened as a result of his recklessness. So that is our theory that there is not a murder in this case. However, if there's anything at all, it would be an

involuntary. That's hour theory.

So we are entitled to instructions on our theory of the case. I'm just defining involuntary manslaughter based on the lawful act manslaughter that's set forth in the statute. And instructions are supposed to be tailored, specifically to the facts of the case.

Mr. Lalli is not entitled to instruction based on theories that are not related to the facts of the case and theories upon which we haven't had any notice for an unlawful act involuntary. So we are entitled to those tailored instructions. The State has a burden of -- of proving malice beyond a reasonable doubt. And if they don't prove malice, that they prove something less than malice, there's two types of recklessness. You have either the extreme malignant recklessness, which is malice for murder. Or you have just regular recklessness, which is enough for involuntary.

So it's a subset of that type of murder. It's a lesser included under these circumstances. It's Mr. O'Keefe's theory of the case. We're entitled to tailor instructions and that's all this is -- this is setting forth. This is the instruction we're requesting.

MR. LALLI: In not one document that she's filed with the court has she ever said it's her theory of the case. In fact, in pleadings she said just the opposite. Yesterday it's my recollection she -- I mean, she was incapable of coming up

exhibit 16

Q250630

S.C.N. No. 53859

FAST TRACK STATEMENT

FIRST TRIAL

FILED AUG 19 2009

exhibit 16

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Case No. 53859
District Court Case No. C250630

FILED
AUG 19 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

FAST TRACK STATEMENT

1. **Name of party filing this fast track statement:** Appellant Brian O'Keefe

2. **Name, law firm, address, and number of attorney submitting this fast track statement:** JoNell Thomas, Clark County Special Public Defender's Office, 330 South 3rd Street, Suite 800, Las Vegas, Nevada 89155, (702) 455-6265.

3. **Name if different from trial counsel:** n/a

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District Court, Clark County, Docket No. C250630

5. **Name of judge issuing order appealed from:** Honorable Michael Villani

6. **Length of trial.** 5 days.

7. **Conviction appealed from:** One count of second degree murder with use of a deadly weapon.

8. **Sentence for each count:** A term of 10 to 25 years for second degree murder and a consecutive term of 96 months to 240 months for the weapons enhancement.

9. **Date district court announced decision, sentence, or order appealed from.** 5/5/09.

10. **Date of entry of written judgment or order appealed from:** 5/8/09

11. **If this appeal is from an order on a petition for a writ of habeas corpus .... n/a**

12. **If the time for filing the notice of appeal was tolled by a post-judgment motion:** n/a

RECEIVED
AUG 19 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

09-20141

13. **Date notice of appeal filed:** 5/21/09

14. **Specify rule governing the time limit for filing the notice of appeal:** NRAP 4(b)

15. **Specify statute which grants this court jurisdiction:** NRS 177.015.

16. **Specify nature of deposition.** Judgment of conviction entered pursuant to a jury verdict.

17. **Pending and prior proceedings in this court.** None known to counsel.

18. **Pending and prior proceedings in other courts.** None known to counsel.

19. **Proceedings raising same issues.** None known to current counsel.

20. **Procedural history.** The State charged O'Keefe with murder with use of a deadly weapon. 1 App. 1. He entered a plea of not guilty and invoked his right to a speedy trial. 1 App. 5. The State filed a motion to admit bad act evidence which was addressed by the district court. 1 App. 8. It did not include as a bad act the claim that O'Keefe used a racial epithet while talking with an officer. 1 App. 8-9. An Amended Information was filed. 1 App. 12. The State did not charge a theory of felony murder. 1 App. 12. Trial began on March 16, 2009. 1 App. 20, 65. During trial, O'Keefe filed a brief on the admissibility of evidence of the alleged victim's history of suicide attempts, anger outbursts, anger management therapy, self-mutilation (with knives and scissors) and erratic behavior. 2 App. 313. Proposed jury instructions were submitted by O'Keefe. 2 App. 322. After five days of trial, on March 20, 2009, the jury returned a verdict finding O'Keefe guilty of second degree murder with use of a deadly weapon. 2 App. 309, 380. O'Keefe filed a motion to settle the record, which addressed matters that took place in chambers and during unrecorded bench conferences. 2 App. 381. Argument on the motion took place on April 7, 2009. 2 App. 387. The sentencing hearing was held on May 5, 2009. 2 App. 391. As noted above, this timely appeal followed.

21. **Statement of facts.** Brian O'Keefe and Victoria Whitmarsh, the alleged victim, met in a treatment facility in 2001. 1 App. 95, 2 App. 256. They dated and co-habitated off and on, and had what could be described as a very tumultuous relationship. 2 App. 256-57. In 2004, O'Keefe was convicted of burglary for entering into the couple's joint dwelling with the intent to commit a crime against Whitmarsh. O'Keefe was sentenced with probation, but his

probation was revoked when he was convicted of a third offense of domestic battery against Whitmarsh and he went to prison in 2006. 1 App. 192; 2 App. 257. Whitmarsh testified against O'Keefe in the domestic battery case. 1 App. 192.

When O'Keefe was released from prison in 2007, he met and began a relationship with Cheryl Morris. 1 App. 93; 2 App. 257. He would often speak to Morris about his previous relationship with Whitmarsh, and even expressed to her that he still had strong feelings for Whitmarsh. 1 App. 93-94, 99. Morris claimed at trial that O'Keefe said he was upset with Whitmarsh because she put him in prison and he said he wanted to "kill the bitch." 1 App. 94. Morris testified that O'Keefe left at one point to be with Whitmarsh, and then telephoned Morris, asking her to move out of their jointly shared apartment so Whitmarsh could move in. 1 App. 93. Morris testified that Whitmarsh got on the phone with her during that call and told her she had decided to resume her relationship with O'Keefe. The two of them appeared to be a loving couple and were open about their relationship. 1 App. 85; 2 App. 215, 218-19.

At about 10:00 p.m. on the evening of the incident, in November 2008, a neighbor who lived in the apartment below O'Keefe and Whitmarsh heard what she described as thumping and crying noises coming from upstairs. 1 App. 67. The noise became so loud that it woke her husband, Charles Toliver, who was in bed next to her. 1 App. 67, 70. Toliver went upstairs to inquire about the noise and found the door to O'Keefe's apartment open. 1 App. 72. He yelled inside to get the occupants' attention, at which time O'Keefe came out of the bedroom and shouted at Toliver to "come get her!" 1 App. 72-73. When Toliver entered the bedroom, he saw Whitmarsh lying on the floor next to the bed and saw blood on the bed covers. 1 App. 73. O'Keefe was holding her and saying "baby, baby, wake up, don't do me like this." 1 App. 73, 76. O'Keefe did not stop Toliver from going in the apartment or otherwise fight with him. 1 App. 76. Toliver left the apartment immediately and shouted at a neighbor who was outside to call the police. 1 App. 73. He also brought Todd Armbruster, another neighbor, back upstairs. 1 App. 74. O'Keefe was still holding Whitmarsh and told Armbruster to get the hell out of there. 1 App. 74. Armbruster called

911. 1 App. 80. He thought that O'Keefe was drunk. 1 App. 80-81.

By this time, shortly after 11:00 p.m., police had arrived on the scene. 1 App. 74-103. When they entered the bedroom, they found Whitmarsh lying on the floor next to the bed and an unarmed O'Keefe cradling her in his arms and stroking her head. 1 App. 112, 114. The police believed Whitmarsh to be dead and ordered O'Keefe to let go of her, but he refused. 1 App. 103, 105, 112. The officers eventually had to subdue him with a taser gun and forcibly carried him out of the bedroom. 1 App. 108, 112, 120, 129. O'Keefe was acting agitated, 1 App. 108, the officers testified that he had a strong odor of alcohol on him, and he appeared to be extremely intoxicated. 1 App. 122, 200-01. Much of his speech was incoherent, but at one point he said that Whitmarsh stabbed herself and he also said that she tried to stab him. 1 App. 104-06, 111, 113, 121, 126. They arrested him and brought him to the homicide offices. 1 App. 134.

Subsequent to his arrest, O'Keefe gave a rambling statement indicating he was not aware of Whitmarsh's death or its cause. 1 App. 190. Police interviewed him at 1:20 a.m., at which time he was crying, raising his voice, talking to himself, and slurring. Detective Wildemann stated that during the interview O'Keefe smelled heavily of alcohol, and when police took photographs of him at about 3:55 a.m., they had to hold him upright to steady him. 1 App. 194. Wildemann said it was pretty obvious that O'Keefe had been drinking, however, law enforcement did not obtain a test for his breath or blood alcohol level either before or after the interview. 1 App. 194.

Whitmarsh had also been drinking on the date of the incident, and at the time of her death, her blood alcohol content was 0.24. 1 App. 181, 186. She died of one stab wound to her side and had bruising on the back of her head. 1 App. 180, 183. Medical Examiner Dr. Benjamin testified that Whitmarsh's toxicology screen indicated that she was taking Effexor and that drug should not be taken with alcohol. 1 App. 184-85. Whitmarsh had about three times the target dosage of Effexor in her system. 2 App. 234. The combination of Effexor and alcohol could have caused anxiety, confusion and anger. 2 App. 234. Whitmarsh also had Hepatitis C and advanced Cirrhosis of the liver, which is known to cause bruising with

only slight pressure to the body. 1 App. 180-81. Whitmarsh's body displayed multiple bruises at the time Dr. Benjamin examined her and the bruises were different colors, but she could not say that they were associated with Whitmarsh's death or otherwise say how long ago Whitmarsh sustained the bruises. 1 App. 186. DNA belonging to O'Keefe and to Whitmarsh was found on a knife at the scene. 1 App. 173-74.

O'Keefe testified. 2 App. 254. He acknowledged his problems with alcohol and described his history with Whitmarsh. 2 App. 254-58. He disputed Morris's claim that he said he wanted to kill Whitmarsh, but he acknowledged being angry with her. 2 App. 258. It was Witmarsh who called O'Keefe and she initiated their renewed relationship. 2 App. 258. He was aware that Whitmarsh had Hepatitis C when she moved into his apartment. 2 App. 259-60. In November, 2008, Whitmarsh was stressed because of her financial condition. 2 App. 268. A couple of days before the incident at issue here, Whitmarsh confronted O'Keefe with a knife. 2 App. 269. She had been drinking and was on medication. 2 App. 269. O'Keefe had not been drinking that night and was able to diffuse the situation. 2 App. 269. On November 5, 2009, O'Keefe learned that he would be hired for a new job and had two glasses of wine to celebrate. 2 App. 269-70. O'Keefe and Whitmarsh went to the Paris Casino where they both had drinks. 2 App. 270. They returned home and she went upstairs while he reclined in the passenger seat of the car for a period of time. 2 App. 271. He went upstairs and then smoked outside on a balcony while she was in the bathroom. 2 App. 272. He then went in the bedroom and saw Whitmarsh coming at him with a knife. 2 App. 272. He swung his jacket at her and told her to get back. 2 App. 272. He knew that she was mad at him about a lot of things. 2 App. 272. He grabbed the knife, she yanked it and cut his hand. 2 App. 272. They struggled for a period of time. 2 App. 272-73. While fighting, she fell down, he fell on top of her and then he realized that she was bleeding. 2 App. 273. He was still drunk at this point and was trying to figure out what happened. 2 App. 273. He tried to stop the bleeding and panicked. 2 App. 274. He tried taking care of Whitmarsh and asked his neighbor to call someone after the neighbor came into his room. 2 App. 274. He became agitated when the neighbor brought another neighbor

[illegible] Whitmarsh was partially undressed, rather than calling the paramedics. 2 App. 274. O'Keefe denied hitting or slamming Whitmarsh. 2 App. 275. He testified that he did not intentionally kill Whitmarsh, but felt responsible because he drank that night and he should not have done so. 2 App. 276.

22. **Issues on appeal.**

A. Whether the district court denied O'Keefe his state and federal constitutional rights to present evidence by prohibiting him from introducing evidence of the deceased's prior suicide attempts, self reported bi-polar conditions, "cutting" and other acts, and anger management issues and treatment that were contained within her medical records and that were within the knowledge of O'Keefe.

B. Whether the district court erred, and denied O'Keefe his state and federal constitutional rights to due process and a fair trial, by refusing to strike an erroneous jury instruction and instead directing the State not to rely upon the erroneous instruction in its closing argument.

C. Whether the district court erred, and denied O'Keefe his state and federal constitutional rights to due process and a fair trial, by allowing a transportation officer to testify that O'Keefe "told him to turn off that "nigger" music." O'Keefe's counsel were not given notice of this highly prejudicial statement.

D. Whether the district court erred by allowing photos of bruises on the body of the deceased despite the lack of relevance to this case due to the difficulty in determining the time of the bruising with the deceased's Hepatitis C and cirrhosis issues.

E. Whether the district court denied O'Keefe his state and federal constitutional rights to a fair trial by allowing a police detective to testify and offer his "expert" opinion whether the wounds on O'Keefe's hands were defensive wounds, while also denying O'Keefe the right to call his own expert to testify as to whether or not the wound on the deceased could have been caused by an accident.

F. Whether the district court's rulings on jury instructions were erroneous.

23. **Legal argument, including authorities.**

A. The district court denied O'Keefe his state and federal constitutional rights to present evidence by prohibiting him from introducing testimony and evidence of the deceased's prior suicide attempts, self reported bi-polar conditions, "cutting" and other acts, and anger management issues and treatment that were contained within her medical records and that were within O'Keefe's knowledge.

The State objected to the admission of any testimony concerning Whitmarsh's suicide attempts and to admission of documents concerning Whitmarsh's medical history. 2 App. 230. O'Keefe's counsel submitted points and authorities as to the admissibility of evidence